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80-1876

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

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THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

CORNELIUS PLANTEFABER,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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## QUESTIONS PRESENTED

(1) WHERE LAW ENFORCEMENT OFFICERS HAVE PROBABLE CAUSE TO BELIEVE THAT LUGGAGE CHECKED BY A DEPARTING AIRLINE PASSENGER CONTAINS A CONTROLLED SUBSTANCE, MUST THE OFFICERS ARREST THE PASSENGER, SEIZE HIS LUGGAGE AND OBTAIN A SEARCH WARRANT, OR, UNDER THE DOCTRINE OF EXIGENT CIRCUMSTANCES MAY THEY OPEN THE LUGGAGE TO MAKE CERTAIN THAT CONTRABAND IS PRESENT BEFORE ARRESTING THE DEPARTING PASSENGER?

(2) SHOULD THE EXCLUSIONARY RULE BE APPLIED RETROACTIVELY TO SUPPRESS EVIDENCE OBTAINED FROM A PRE-CHADWICK SEARCH OF AN AIRLINE PASSENGER'S LUGGAGE?

## PARTIES TO THE PROCEEDINGS

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NOW COMES James J. Gregart, Prosecuting Attorney in and for the County of Kalamazoo, State of Michigan, by Michael H. Dzialowski, Principal Appellate Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on March 10, 1981.

## OPINIONS BELOW

The Michigan Court of Appeals by opinion issued August 20, 1979, and published at 91 Mich App 764, 283 NW2d 846, ruled that the luggage search was justified. Arizona police officers trained in narcotics investigation observed respondent in an airport and concluded he fit a narcotics profile and the officers detected the odors of marijuana and talcum powder emanating from respondent`s suitcases which was sufficient for probable cause to search the suitcases; the Court further ruled the police were justified in conducting an immediate search because the suitcases had already been checked for passage to Michigan and both Respondent and his luggage were scheduled to depart shortly. This opinion is appended as Appendix A.

The Supreme Court of Michigan reversed the lower Court ruling by opinion issued March 10, 1981, and published at 410 Mich 594, 302 NW2d 557. The Michigan Supreme Court ruled the search was a violation of Respondent`s Fourth Amendment rights against unreasonable search and seizure. This opinion is appended as Appendix B.

## STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued August 20, 1979. The Court of Appeals opinion was reversed by the Michigan Supreme Court in an opinion issued March 10, 1981. The jurisdiction of this Court is envoked under 28 U.S.C. Sec. 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF FACTS

On July 26, 1973, Respondent was observed entering the Tucson, Arizona International Airport terminal and running up to a TWA ticket counter. He purchased a ticket for Kalamazoo, Michigan. He checked two suitcases and sat down. Respondent was first observed at 10:45 p.m. Respondent's flight left at 11:17 p.m. Respondent was in the airport terminal for 32 minutes.

Members of the Tucson, Arizona narcotics squad were at the airport observing passengers for possible narcotics activity. Respondent fit the profile established by the narcotics squad of those involved in narcotics traffic.

The police officers went into the baggage area and could smell marijuana and talcum powder from the outside of

Respondent's suitcases. The suitcases were seized. One of the suitcases was opened and 14 bricks of marijuana were found. The suitcases were placed on the conveyor belt for the plane which the officers knew was leaving within the next few minutes.

The police authorities in Kalamazoo, Michigan were notified by the Arizona police of what had transpired. Kalamazoo officers observed Respondent arrive, pick up his baggage and take it to a taxicab. The officers did not arrest Respondent at this time due to the arrival of a school bus loaded with young children. The officers ordered the taxi stopped as it left the airport. Respondent was placed under arrest. One of the suitcases was opened at the point of the stop. At no time was a search warrant ever obtained.

The Michigan Court of Appeals ruled that there was an adequate showing of exigency to support the need for an immediate warrantless search. The test applied was that of the reasonableness of the search in Arizona, relying on Cooper v California, 386 US 58, 87 S Ct 788, 17 LEd 2d 730 (1967) rather than on United States v Chadwick, 433 US 1, 97 S Ct 2476, 53 LEd 2d 538 (1977). The Court in footnote 4 determined it need not discuss the retroactive applicability of Chadwick.

The Michigan Supreme Court ruled that there were no exigent circumstances authorizing a warrantless search of Respondent's luggage. The Michigan Supreme Court relied entirely upon this Court's decisions of United States v Chadwick, supra, and Arkansas v Sanders, 442 US 753, 99 S Ct 2686, 61 LEd 2d 235 (1979) in reaching its decision.

## REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court held that the Arizona Police lacked exigent circumstances and, therefore, acted improperly in searching Respondent's luggage. The Michigan Court ruled "once they had it in their custody and control by removing it from the conveyor . . . the claimed exigency of mobility had passed upon their seizure of the luggage." The Michigan Court relied almost entirely upon this Court's holdings in United States v Chadwick, 433 US 1, 97 S Ct 2476, 53 LEd 2d 538 (1977) and Arkansas v Sanders, 442 US 753, 99 S Ct 2586, 61 LEd 2d 235 (1979). Petitioner submits that the Michigan Supreme Court has misapplied Chadwick and Sanders, and, thereby, the Fourth Amendment.

In both Chadwick and Sanders exigent circumstances were absent because the

defendants were under arrest. This was not true in the present case. The Arizona police could have simply seized the luggage and perhaps stopped the airplane and arrested the Respondent. This should not have been their only choice of action.

This Court did not set up a higher degree of privacy expectation with regard to luggage in Chadwick. Rather, this Court noted that luggage does not share the diminished expectation of privacy which surrounds the automobile. Petitioner does not contend that there is a lesser requirement for a warrant to seize the contents of luggage than there is for the seizure of other items. The question in the present case does not involve the expectation of privacy. Rather, it involves exigent circumstances due to the intended mobility of luggage in common carrier airline travel. While

Chadwick prohibits a reduction of warrant requirements merely because the item is luggage, it does not prohibit seizure where exigent circumstances are involved. In fact, this Court indicates that given exigent circumstances the seizure of the footlocker in Chadwick, would have been justified, United States v Chadwick, supra, 54 LEd 2d 538, at 548.

Petitioner relies upon the existence of actual exigent circumstances which takes this case outside the Chadwick-Sanders rationale. The Arizona police were working under a time constraint. There was only a thirty-two minute time frame within which to work and make the correct on the spot legal decision. The probable cause to search the luggage did not arise until after Respondent had checked his luggage and boarded the airplane. A hurried arrest in these circumstances

certainly qualifies as exigent circumstances. The police could have attempted a hurried arrest, however, this is a dangerous situation. There is the danger to the public inherent in a hastily contrived arrest aboard an airplane or in an airport terminal. It is merely conjecture whether an arrest could have been made and made without danger to the public. The Arizona police acted reasonably in seizing and searching Respondent`s luggage under these exigent circumstances.

The alternatives facing the police were to get a search warrant and be left without the perpetrator of the offense or to make a mandatory arrest. The police officer in the heat of an investigation under the time constraints present in the instant case should be required to only act reasonably not with legal certainty.

Faced with the situation as described it was reasonable to be certain of the contents of the luggage. Probable cause does not mean absolute certainty. See Hill v California, 401 US 797, 91 S Ct 1106, 28 LEd 2d 484 (1971). The opening of the suitcases in Arizona was therefore, proper, rendering its seizure and opening in Michigan also proper. CF. California v Riegler, ___ U.S. ___, 66 LEd 2d 791 (1981) (Rehnquist, J., in Chambers)

Throughout the entire case Petitioner has maintained and argued that Chadwick, supra, and Sanders, supra, was not raised directly. However, the Michigan Court of Appeals in footnote 4 of its opinion did indicate that since their analysis disposed of the Michigan search issue, the Court would not consider the retroactive application of Chadwick, 283 NW2d 846, 850.

There is currently a split among the United States Circuit Courts of Appeal as to whether or not Chadwick, supra, will be applied retroactively to pre-Chadwick cases. There is only the Eighth Circuit which has given Chadwick retroactive application in United States v Schleis, 582 F2d 1166 (8th Cir. 1978). The Second, Fifth, Sixth, Seventh and Ninth Circuits have all ruled that Chadwick decided June 21, 1977, is not retroactive to searches conducted prior to that date. United States v Reda, 563 F2d 510 (2d Cir. 1977) cert. denied, 435 U.S. 973, 98 S. Ct. 1617, 56 L.Ed.2d 65 (1978); United States v Montgomery, 558 F.2d 311 (5th Cir. 1977); United States v Calandrella, 605 F.2d 236 (6th Cir. 1979); United States v Berry, 571 F.2d 2 (7th Cir. 1978), cert. denied, 439 U.S. 840, 99 S. Ct. 129, 58 L.Ed. 2d 138 (1978); United States v Choate, 576 F2d 165 (9th Cir. 1978), cert.

denied, 439 U.S. 953, 99 S Ct 350, 58 L.Ed. 2d 344 (1978).

If this Court agrees that Chadwick, supra, applies to the instant case then it cannot be applied retroactively to this search which occurred on July 26, 1973. This Court in United States v Peltier, 422 U.S. 531; 95 S. Ct. 2313, 45 L.Ed. 2d 374 (1975) addressed the problem of retroactive application of the exclusionary rule in a Fourth Amendment setting. This Court applied two rationales for the exclusionary rule, the imperative of judicial integrity and the deterrance of illegal police conduct. This Court ruled that neither of these goals would be served by excluding evidence which police officers believed in good faith was admissible at trial.

In 1973 there was no reason for police officers to believe suitcases were not

included with personal effects which could be searched incidental to a lawful arrest. United States v Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L.Ed. 2d 427 (1973). The Michigan officers were acting reasonably in light of the then existing law. The Arizona officers were also acting reasonably in light of the exigent circumstances which they faced.

Petitioner submits that the Michigan Supreme Court misapplication of Chadwick and Sanders as well as the retroactive effect given them warrants plenary review by this Court.

## CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with and misconceives decisions of this Court, and is in conflict with the Fourth Amendment of the United States Constitution such that plenary review should be granted by the Court, and Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: May 5, 1981/slk

APPENDIX A

COURT OF APPEALS OPINION

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

August 20, 1979

Plaintiff-Appellee,

v No. 78-2022

CORNELIUS PLANTEFABER,

Defendant-Appellant.

BEFORE: WALSH, P. J., and KELLY and OPPLIGER,* JJ.

WALSH, Presiding Judge.

Defendant was convicted in a bench trial of possession of marijuana with intent to deliver, M.C.L. 335.341(1)(c); M.S.A. 18.1070(41)(1)(c). He was sentenced to a three-year term of probation and was ordered to pay court costs in the amount of $500.

On July 26, 1973, police officers of the Metropolitan Narcotics Squad in Tucson, Arizona, were conducting a general surveillance at the Tucson, International Airport. They were observing persons and baggage at the airport for possible narcotics activity. At 10:45 p.m. defendant was seen entering the airport terminal and running up to the TWA ticket counter after being told that an American Airlines flight he wanted was full. He bought a ticket for a flight to Kalamazoo, Michigan. The flight was scheduled to leave a 11:17 p.m. Defendant checked two suitcases with the airline agent. According to two officers who saw defendant, he fit the "profile" used by narcotics investigators in detection of persons possibly involved in narcotics activity. For example, defendant had arrived at the airport shortly before his departure, he was very nervous and did not

let go of his bags until they were checked with the airline. Defendant's age, dress and the apparent heaviness of his bags were also considered material factors. Two other officers were stationed in the lower level baggage area, to which a conveyor belt conveyed luggage which had been checked with the airline. They were in the process of smelling all of the bags and were told to pay particular attention to those of defendant. One of the officers testified that he smelled defendant's suitcases and detected the odors of marijuana and talcum powder, which is commonly used to mask the odor of marijuana. Talcum powder was seen on the outside of one of the suitcases. One suitcase was opened and found to contain 14 bricks of marijuana. One brick was removed and retained by the officers. Another was removed, marked and returned to the suitcase. The suitcase was then

closed and sealed. An edge of the other case was pried open; marijuana bricks were seen inside the case. Because of the plane's departure, there wasn't time to open this suitcase. The cases were each replaced on the conveyor belt for loading onto the plane.

Lt. Michael Moshier of the Kalamazoo Police Department received a phone call from one of the Arizona officers in the early morning hours of July 27. The Arizona officers gave him a description of defendant and his suitcases and information concerning defendant's arrival. This information was forwarded to Officer Wayne Loney, who went to the Kalamazoo airport and saw defendant disembark from the plane. He watched defendant claim the two suitcases which matched the description relayed to him by Lt. Moshier. Defendant took the bags to a

taxicab. As the taxicab drove away from the airport, it was stopped by the police. Defendant was arrested and the suitcases were removed from the taxicab. One of the cases was opened at that time. The other suitcase was opened at the jail to which defendant was taken.

Defendant unsuccessfully moved for suppression of the evidence relating to the contents of his suitcases, claiming that he had been the victim of two unconstitutional searches and seizures. With respect to the police activity in Arizona, the trial court found that defendant had matched the narcotics profile, that experienced officers had detected the odor of marijuana in defendant's suitcases, and that there had not been time for the Arizona officers to obtain a search warrant before the departure of defendant's plane. That

court ruled that the existence of probable cause and exigent circumstances had made the warrantless Arizona search and seizure reasonable. We agree.

[1] In determining if the Arizona officers had probable cause to search the suitcases, we must examine the facts, circumstances and the information known to them at the time of the search. People v Rodriguez, 83 Mich App 609, 269 NW2d 199 (1978).

The Arizona officers had observed defendant and had concluded that he matched a narcotics "profile". The officers were specially trained in narcotics investigation and were experienced in detection of marijuana. They detected the odors of marijuana and talcum powder emanating from the suitcases. As observed by Justice Williams in People v Hilber, 403 Mich 312,

333, 269 NW2d 159 (1978) (dissenting opinion of Williams, J.), the United States Supreme Court has recognized "the evidentiary quality of odor". See Johnson v United States, 333 U.S. 10, 68 S Ct 367, 92 L Ed 436 (1948).

With respect to probable cause, the United States Supreme Court's decision in United States v Chadwick, 433 U.S. 1, 97 S Ct 2476, 53 L Ed 2d 538 (1977), supports the trial court's ruling. In that case the Supreme Court affirmed suppression of evidence because of the absence of the requisite exigency for a warrantless search and seizure. The Court, however, did not disturb the holding of the First Circuit Court of Appeals that there had been probable cause to search the defendants' footlocker. Railroad officials in San Diego had noticed that the footlocker, which they saw being

loaded onto a train bound for Boston, was unusually heavy and that it was leaking talcum powder. Because one of the defendants matched a profile used to spot drug traffickers, the officials notified Federal agents in San Diego, who relayed the information to Federal narcotics agents in Boston. When the train arrived in Boston, the footlocker ws claimed by the defendants. The Federal agents released a police dog trained to detect marijuana near the footlocker. Without alerting the defendants, the dog signaled the presence of a controlled substance inside the footlocker. We agree with the First Circuit that there was probable cause to search the footlocker. We also see no significant distinction regarding probable cause, between that case and the case at hand.

[2] Defendant's reliance on People v Hilber, supra, is misplaced. In that case, although some of the Justices acknowledged distinctions between the separate odors of unburned, burning and burned marijuana insofar as those odors might constitute probable cause for a search, there was no disagreement that the odor of unburned marijuana was indicative of the actual presence of marijuana.[1]

[3] Although we agree with the trial court's determination that there was probable cause to search defendant's suitcases in Arizona, our inquiry must go further to a determination of whether there was an adequate showing of some exigency to support the need for an immediate warrantless search. United States v Chadwick, supra, 433 US 15, 97 S Ct 2476. We are guided by the standard of reasonableness, the cornerstone in Fourth

Amendment analysis. United States v Chadwick, supra, 9, 97 S Ct 2476. The test is not whether the police could have secured a search warrant but whether the search was reasonable. Cooper v California, 386 U.S. 58, 62, 87 S Ct 788, 17 L Ed 2d 730 (1967).

Our review of the record convinces us that the Arizona officers were justified in conducting an immediate search of defendant's suitcases. The circumstances at the time of the search were sufficiently exigent to make this course of action entirely reasonable. The suitcases had already been checked for passage to Kalamazoo. Both defendant and his luggage were scheduled to depart shortly. Only 32 minutes passed between the time defendant was seen entering the airport and the scheduled departure time of the plane.

This case is similar to the Maryland case of Waugh v State, 20 Md App 682, 318 A2d 204 (1974), rev'd on other grounds 275 Md 22, 238 A2d 268 (1975),[2] where the Maryland Court of Special Appeals noted that it would have been impractical for the Arizona police to obtain a warrant for search of the defendant's suitcases which were to leave shortly for Maryland. The Maryland Court also rejected the notion that the police who opened the defendant's suitcases in Arizona should have requested the airline to hold the luggage or should have relied on the police at the end of the flight to obtain search warrants.[3] See also United States v Ford, 525 F2d 1308, 1313 (CA 10, 1975). We conclude that the trial court's refusal to suppress evidence of the Arizona search was correct.

Defendant's next challenge is to the admissibility of evidence obtained as a result of the opening of his suitcases by the police in Michigan. It is not disputed that no warrant had been obtained by the Michigan authorities and that defendant did not consent to any search of his suitcases by the Kalamazoo police.

[4] If we were to view the Michigan warrantless searches in isolation from the totality of circumstances, we would be perhaps constrained to find them constitutionally firm on the basis of United States v Chadwick, supra.[4] However, we decline to accept defendant's apparent contention that the opening of his suitcases in Michigan must be viewed as separate and distinct from what occurred in Arizona.

In United States v DeBerry, 487 F2d 448 (CA 2, 1973), the defendant's challenged

the seizure in New York of a suitcase containing marijuana first discovered in a California search. The Second Circuit panel first found no infringement of Fourth Amendment rights in the inspection of the luggage by a Los Angeles air freight supervisor. The supervisor found 15 bricks of marijuana in the suitcase. He notified the Los Angeles police, who inspected the bag and relayed the information to New York authorities. The bag was placed under surveillance upon its arrival in New York. It was eventually seized when the defendants, who had picked it up at the New York airport, were arrested. Noting the 15-hour prearrival notice given by the Los Angeles police, the Court rejected the government's contention that it would have been "unduly burdensome" for the New York authorities to obtain a search warrant. Id, 450-451, fn. 3. Nevertheless, the Court ruled that

the New York authorities need not have obtained a search warrant.

> It may be argued that the New York seizure was separate and distinct from the California search, and because there was ample opportunity for the New York officers to obtain a warrant for the suitcase's seizure, its warrantless seizure violated the fourth amendment. See Coolidge v New Hampshire, 403 US 443, 470-471, 91 S Ct 2022, 29 L Ed 2d 564 (1971). This, however, would ignore the facts and realities of the situation. The suitcase was seized initially in California by Sergeant Figelsky of the Los Angeles Police Department. That seizure although done without warrant was legal, because Emery's legal inspection in effect put the marijuana in Figelsky's plain view; he, therefore, could seize the contraband upon sight. Cf. United States v Riggs, 474 F 2d 699 (2d Cir. 1973), cert. denied, 414 U.S. 820, 94 S Ct 115, 38 L Ed 2d 53 (1973). Figelsky made the seizure by removing one of the bricks of marijuana, marking all of the rest of the bricks with his initials, and finally marking the suitcase itself with his initials. He then authorized the suitcase to be shipped on. Even though the suitcase was then in transit, later in the luggage bin, and later still in the freight room, it remained legally "seized" just

> as much as if it were under the actual physical control of the police. In fact, except for the time that it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car appellants were in, they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait. Accordingly, no warrant was required. Id., 450-451. (Footnotes omitted, emphasis added.)

In accord is United States v Ford, supra, where the Court rejected the defendant's assertion that an Oklahoma seizure was separate and distinct from a California search and further rejected the argument that, since there was time to obtain a warrant before the Oklahoma seizure, the failure to do so violated the Fourth Amendment. Finding that the defendant's "analysis misapprehend[ed] the facts and realities of the situation", the Court stated:

> Realistically, the contraband was seized by the officers in California before it was ever shipped to Oklahoma. See United States v DeBerry, 487 F2d 448 (2d Cir. 1973). The California officers marked the package and placed a business card inside it. Upon receiving assurances of cooperation from Oklahoma City officers, they authorized its shipment. This action constituted the initial act of control and dominion over the contraband, for without government authorization the airline officials could not have shipped the contraband. This official dominion continued unbroken because close surveillance followed the seized contraband, insuring that it remain within official possession. Actual physical control was in fact reasserted by the Oklahoma City police when the arrest process was completed. These material facts are indistinguishable from DeBerry, supra, and we adopt the analysis of that case in concluding that the official seizure of the contraband occurred in San Francisco when the government asserted dominion over it. The seizure must be adjudged against the Fourth Amendment as of that time and place. 525 F2d 1308, 1312-1313.

Also see Waugh v State, supra, 20 Md App 682, 708-709, 318 A2d 204, and State v

Pohle, 160 N.J.Super. 576, 583, 390 A2d 692 (1978).

We conclude that the reopening of defendant's suitcases in Michigan was not a prohibited "search". The police, in effect, exercised continuous control over the suitcases from the time of the Arizona search until defendant's arrest in Michigan. As discussed, supra, there was no constitutional violation in the Arizona search.

[5] Defendant also argues on appeal that the trial court erred in denying his motion to dismiss on the grounds that the prosecution failed to endorse and produce one of the Arizona officers. Only three of the four Arizona officers were produced at trial. After hearing the parties' arguments, the trial court ruled that the missing officer was not a res gestae

witness and that, even if he were, his testimony would be merely cumulative.

We disagree with the trial court's determination that the missing Arizona officer was not a res gestae witness. People v Abdo, 81 Mich App 635, 643, 265 NW2d 779 (1978). Defendant is entitled to a determination of whether nonproduction adversely affected his right to a fair trial. People v Pearson, 404 Mich 698, 273 NW2d 856 (1979).

Review of the record, however, reveals that such a determination has already been made and that no reversible error occurred. Compare People v Porter, 406 Mich 890, (1979). The record fully supports the trial court's conclusion that the witness's testimony would have been merely cumulative.

We have considered the remaining issue raised by defendant on appeal and find no reversible error with respect to that issue.

Affirmed.

## APPENDIX A FOOTNOTES

[1]. Defendant also cites cases involving the admissibility of tracking dogs evidence. Attacking the reliability of the Arizona officers' testimony concerning their detection of marijuana, he argues that "a human whose degree of smell is presumably inferior compared to a dog should not be allowed to validate his own experience by his own self-serving statements". We find unpersuasive defendant's analogy to tracking dog evidence. Such evidence is admissible only if it satisfies certain foundational requirements. People v Norwood, 70 Mich App 53, 245 NW2d 170 (1976), lv. den. 397 Mich 884 (1976); People v Harper, 43 Mich App 500, 204 NW2d 263 (1972), lv. den. 389 Mich 759 (1973). Tracking dog evidence standing alone, however, is insufficient to support a conviction. People v McPherson, 85 Mich App 341; 271 NW2d 228 (1978); People v Perryman, 89 Mich App 516, 280 NW2d 579 (1979). In McPherson, the Court examined the arguments against admission of tracking dog evidence and found therein several reasons for the necessity of corroborating evidence. Among the principal objections to the use of tracking dog evidence are the defendant's inability to cross-examine the dog and the deprivation of the defendant's right to confront his accusers. Also significant is the court's inability to determine why the dogs act as they do. 85 Mich App 345-346, 271 NW2d 228, citing 18 A.L.R.3d 1221, 1223-1224. These objections are not relevant to the testimony of humans who are available for cross-examination. McPherson, implicitly recognizes that the corroborating evidence rule would not apply if tracking dogs were

capable of understandingly taking an oath, describing their credentials and experience, and detailing the stages of their investigations. We are not persuaded that the sense of smell of humans cannot be used to establish probable cause or that the "self-serving" testimony of the person doing the smelling is inherently unreliable.

2. In reversing the earlier decision in Waugh, the Maryland Court of Appeals found that the Arizona search was invalid because based on insufficiently verified informant information and that the Arizona officer had not smelled marijuana in the defendant's suitcases but had only smelled talcum powder, in itself not an unusual item in a suitcase. The Arizona officers had not had even reasonable ground to search the suitcases.

3. The Waugh court's analysis was based on its holding that a warrantless search of a suitcase is constitutionally permissible whenever there is probable cause to believe it contains contraband or other evidence of crime and there are exigent circumstances requiring immediate search. 20 MD App 682, 699; 318 A2d 204. Our analysis is like that of the Maryland court. In our view, United States v Chadwick, supra, confirmed the validity of this analysis. Although the Supreme Court declined to treat luggage in the same manner that automobiles are treated for Fourth Amendment purposes, the Court repeatedly emphasized that, if some exigency exists, warrantless searches of luggage may be permissible. United States v Johnson, 588 F2d 147 (CA 5, 1979), is, we think, in accord with this interpretation of Chadwick.

The United States Supreme Court has recently reaffirmed its Chadwick decision. In Arkansas v Sanders, ___ U.S. ___, 99 S Ct 2586, 61 L Ed 2d 235 (1979), the Supreme Court declined to extend the warrant requirement's "automobile exception" to all searches of luggage taken from automobiles stopped on the highway. The Court specifically recognized, however, that, "[t]here may be cases in which the special exigencies of the situation would justify the warrantless search of a suitcase." Id., ___, fn. 11, 99 S Ct 2593. The state conceded in Sanders that no special exigencies had existed. Moreover, the Court noted the possibly significant circumstances of luggage about to be loaded into an airplane; the public safety may require warrantless searches of such luggage. Id., ___, fn. 12, 99 S Ct 2586.

Although "public safety" concerns were not necessarily involved in the instant case, we nonetheless are of the opinion that the requisite special exigencies have been established.

[4]. Because of our disposition of the Michigan "search" issue, we need not discuss the retroactive applicability of Chadwick. Nor need we determine if, when viewed in isolation, the Michigan activity amounted to a Chadwick search. See, e.g. People v De Santis, 46 NY2d 82, 412 NYS 2d 838, 385 NW2d 577 (1978). And finally, discussion of the relevance of the "automobile exception" in

luggage cases is unnecessary to our disposition.

APPENDIX B

COURT OF APPEALS OPINION

STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

March 10, 1981

Plaintiff-Appellee,

v No. 63745

CORNELIUS PLANTEFABER,

Defendant-Appellant.

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KAVANAGH, Justice.

This case involves the constitutionality of a warrantless search of personal luggage. Minimum constitutional guarantees provide that a search of personal effects must be attended by probable cause [1] and either a warrant or exigent circumstances. [2] The

absence of a warrant in this case reduces the focus of our constitutional assessment to the existence vel non of probable cause and exigent circumstances. Conceding, arguendo, the exigent circumstances authorizing the warrantless seizure of the luggage, there were no exigent circumstances authorizing its warrantless search.

On July 26, 1973, narcotics officers of the Tucson, Arizona Police Department were conducting general surveillance at the Tucson International Airport. Their surveillance consisted of observing people and luggage for possible narcotics activity. At 10:45 p.m. two officers observed defendant as he entered the terminal. The officers testified that defendant appeared nervous and that his general demeanor fit a "profile" which the officers had come to associate with people

who traffic in drugs. Other police officers in a private TWA baggage room smelling all the luggage which passed by on a conveyor were told to pay special attention to defendant`s luggage. Two police officers placed their noses along the seams of defendant`s two suitcases as they passed by along the TWA baggage conveyor. Concluding that they smelled marijuana and talcum powder, the officer removed both suitcases from the conveyor.

With the use of tools the officers broke the lock on one suitcase and searched its contents, discovering 14 bricks of marijuana. Two bricks were removed and marked, one being kept by the police officers in Arizona and never offered in evidence and the other replaced in the suitcase. The other suitcase was pried open at a corner revealing its contents of marijuana. The officers did

not retain custody of the suitcases but closed, sealed and placed them back on the TWA conveyor for loading into the departing plane. One officer returned to the main concourse to confirm defendant's destination as Kalamazoo, Michigan.

The Tucson narcotics officers chose not to arrest defendant but rather to relay all of their information to the Kalamazoo police department. Defendant was observed at the Kalamazoo airport as he disembarked from a plane approximately six hours later. Kalamazoo police officers observed defendant as he collected his luggage and made his way out of the terminal and into a taxicab. The officers testified that they did not arrest defendant as he approaced the taxi because a bus full of children was arriving. The officers waited until the cab left the airport and stopped it as it drove on a nearby road.

The defendant was arrested, and his luggage taken out of the taxi and searched immediately to reveal marijuana.

Neither the Tucson police officers nor the Kalamazoo police officers had obtained or even attempted to obtain a search warrant.

On appeal defendant-appellant contends that the trial court erred in not suppressing the marijuana as a product of an invalid search and seizure. Neither search was carried out pursuant to a warrant and defendant argues that once the police seized his luggage, whether in Arizona or in Michigan, they should have retained custody thereof until a warrant was obtained.

The prosecution contends that the trial court was correct in refusing to suppress the marijuana. Appellee argue that there

was only one search involved. What occurred in Kalamazoo was not a separate search and seizure, it argues, but only a reassertion of control which had been obtained in Arizona. The initial intrusion in Arizona is argued as justified by probable cause and exigent circumstances. The similarity between the defendant`s demeanor and the drug profile along with the odor of unburned marijuana and the presence of talcum powder are argued as providing probable cause to believe defendant`s luggage contained contraband. The impending departure of defendant`s flight to Kalamazoo is argued as an exigent circumstance. The prosecutor further contends that because the Tucson police relayed their information to the Kalamazoo police the authorities never relinquished custody of defendant`s luggage and thus what occurred in Kalamazoo was not a separate search but

merely a continuation of the valid search which began in Arizona.

This argument misses the point.

Whether there was but one seizure or not and whether it was in Arizona or Michigan, the question before us is the propriety of the search of the luggage after its seizure.

The Arizona police could not have searched the luggage once they had it in their custody and control by removing it from the conveyor, because the claimed exigency of mobility had passed upon their seizure of the luggage. United States v Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). If it is conceded, arguendo, that their custody continued and invested the Michigan police with authority to maintain that custody, when the Michigan police removed the suitcases

from the taxi there was no exigency of mobility or otherwise authorizing a warrantless search in Michigan.

In Arkansas v Sanders, 442 U.S. 753, 763, 99 S.Ct. 2586, 2593, 61 L.Ed.2d 235 (1979), the Court observed:

> But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search--after the police have seized the object to be searched and have it securely within their control. See 433 U.S. at 13 [97 S.Ct., at 2484]. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. (Footnote omitted; emphasis added.)

The philosophy behind this holding is set forth in Chadwick where the Court explained its prior holding in Chambers v Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970):

> Respondent's principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but

> in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondent's use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.
>
> It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in Chambers, unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage. 433 U.S. 1, 13-14 fn. 8, 97 S.Ct. 2476, 2484-2485, fn. 8.

When the police have custody and control over personal luggage a warrantless search cannot be justified on the basis of the exigent circumstance of mobility.

The evidence here should have been suppressed.

Our holding on this point obviates the need for discussion of the other issues regarding asserted failure to produce a res gestae witness.

Reversed.

FITZGERALD, Deputy C.J., and RYAN, MOODY and LEVIN, JJ., concur.

WILLIAMS, Justice, concurring.

I concur because the Kalamazoo police had sufficient notice to get a warrant.

COLEMAN, Chief Justice (dissenting).

Defendant was convicted of possession of marijuana with intent to deliver.[1] The Court of Appeals affirmed his conviction. This Court granted leave to appeal[2] and the majority concludes that defendant's conviction must be reversed because of what is deemed an unconstitutional search

of defendant's luggage in Kalamazoo, Michigan. I dissent from this holding, having concluded that the marijuana introduced into evidence was not obtained in violation of defendant's constitutional rights. The search and seizure in Tucson, Arizona was constitutional and the luggage remained in continuing control of the police through the time of arrest in Kalamazoo.

I

The entire Arizona episode took place within 32 minutes.

On July 26, 1973, officers of the Tucson, Arizona, narcotics squad were at the Tucson airport observing passengers for possible narcotics activity. Tucson apparently is a busy crossroad for drug traffic, and surveillance was routine. At 10:45 p.m., two officers observed

defendant as he entered the terminal. They saw defendant hurry to the line at the American Airlines counter carrying two heavy suitcases. When defendant learned the flight he wanted was full, he ran to the TWA counter. He had held his luggage in his hands during this period. He purchased a ticket for a flight via TWA to Kalamazoo leaving at 11:17 p.m. and checked his luggage. Then defendant sat down in a chair next to Officer Fragoso, who was in plainclothes. After a short exchange, defendant walked around the terminal, constantly looking about him, until he boarded his flight.

The experienced narcotics officer concluded that defendant fit the established "profile" of persons possibly involved in narcotics trafficking:[3] The defendant had arrived at the airport hurriedly, just before a flight and

without a ticket. At a second counter he purchased a ticket for an imminent flight. His luggage had appeared to be heavier than usual, causing him to hunch his shoulders but he did not rest it on the floor. He appeared nervous, repeatedly looked over his shoulder and around the room, and could or would not sit still. He talked rapidly when he conversed with the officer. Manner of dress and appearnce were mentioned but did not receive much, if any, weight.

Because defendant appeared to fit the profile established by experience, Officer Fragoso told other officers who were in the baggage claim area to pay particular attention to defendant's luggage when it arrived on the conveyor belt. Serveral officers then detected an odor of marijuana emitting from the luggage and observed talcum powder on the outside of

one suitcase. Talcum powder is widely used to mask the odor of marijuana. Because they had probable cause to believe that contraband was contained in the suitcases, the officers seized defendant's luggage, removing it from the conveyor belt.

The officers then opened one of defendant's suitcases. Inside they found 14 bricks of marijuana. The officers removed two bricks from the suitcase and marked them for identification. They kept one for evidentiary purposes and replaced the other. Then they repacked and eventually closed the suitcase.

They did not have sufficient time to open and inventory the other suitcase because defendant's flight was scheduled to leave. Instead, they pried open one edge, observed more bricks of marijuana and shut the suitcase. In each suitcase

they placed a scrap from a page of a notebook with initials of two officers and the time and date. They replaced the suitcases on the conveyor and the luggage was loaded on the airplane. All of this took place in 32 minutes from defendant's entry into the airport until the plane's departure. The search and seizure took considerably less time.

The defendant made the flight without arrest but Officer Fragoso telephoned the Kalamazoo Police Department to notify them of the information they had obtained. Lieutenant Michael Moshier received the telephone call informing him of descriptive details of defendant and his luggage and results of the Arizona search and seizure.

When defendant disembarked from the airplane in Kalamazoo, an officer placed him under observation. The officer

allowed defendant to pick up the two suitcases and carry them out to a taxicab. Because of a busload of children in that area, no arrest was made there. Defendant left the airport in the cab with the police following. The officers stopped the taxicab as soon as they could without creating unnecessary danger to others. They arrested defendant and removed the suitcases from the trunk. They then opened one of the suitcases, exposing the marijuana.

Defendant was convicted in a bench trial of possession of marijuana with intent to deliver. He was sentenced to three years' probation and ordered to pay court costs of $500.

II

The main issue on appeal is the constitutionality of the officers' actions

in Tucson and Kalamazoo, in searching and seizing defendant's suitcases.

U.S. Const., Am. IV, provides two significant protections for the security and privacy of persons. It protects against "unreasonable searches and seizures". Also, the amendment has been construed to require that most searches of private property be performed pursuant to a search warrant.[4] The warrant provision, requiring review by a neutral and detached magistrate,is the primary protection against the risk of unreasonable assertions of executive authority.[5]

Nevertheless, there are serveral well-recognized exceptions to the warrant requirement. In cases in which the societal cost of obtaining a warrant, such as dangers to law-enforcement officers or others or the risk of loss or destruction of evidence, outweighs the reasons for

requiring a warrant, a warrant may not be required, see United States v United States District Court, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972).

One exception to the warrant requirement is when exigent circumstances do not permit sufficient time to obtain a warrant, see Schmerber v California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).[6] The majority concludes that the circumstances surrounding the search of the luggage in Arizona did not remove the necessity of securing a warrant. I disagree, concluding that the fact that defendant was not in the officers' custody and was in the process of boarding an airplane to leave the jurisdiction constituted exigent circumstances relieving the officers from complying with the warrant requirement. By the time a

warrant could have been obtained defendant would have been long gone. He was not under arrest and his plane was about to depart. It is not "reasonable" to seize the proof of criminality but suffer the criminals to escape. In order to make sense, "exigent circumstances" must encompass mobility of the trafficker as well as the contraband in traffic.

It appears to me that the word "unreasonalbe" is sometimes overlooked in consideration of the prohibition against "unreasonable searches and seizures".

III

The defendant's appearance, activities and behavior upon entering the terminal in Tucson provided a reasonable basis for the officers to pay special attention to defendant's luggage. However, this decision did not constitute a seizure

subject to constitutional scrutiny. The officers, then being in a position in which they had a right to be, detected the odor of marijuana emanating from the suitcases and observed talcum powder on the outside of one suitcase. These perceptions were the equivalent of plain-view observations.

Considering the officers' experiences with hundreds of similar cases and all the circumstances surrounding these observations, I am persuaded that the officers had probable cause to believe that contraband was contained in the luggage. Also, because the luggage was scheduled to be removed from the jurisdiction unless immediate action was taken, the officers were justified in seizing the luggage. I think the majority would not conclude otherwise. Our area of

disagreement is over the propriety of the officers' actions after they seized the luggage.

IV

Defendant relies heavily upon United States v Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). I agree with the Court of Appeals that the case supports the trial judge's ruling. Chadwick concerns a defendant, lawfully arrested, who was brought with his footlocker to the Federal Building. There, the officers searched the footlocker without a warrant. The Court held that, because defendant was under arrest and in custody, no exigent circumstances were present to excuse a warrantless search.

Such is not the case before the Court. The suitcases were already checked for

passage to Kalamazoo (with one stopover) and the plane about to depart with defendant on it. There was no time to seek a search warrant. The existence of probable cause and the exigent circumstance of defendant's imminent departure from Arizona rendered the warrantless search and seizure "reasonable".

Arkansas v Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), concerns a similar situation, but with some different facts. A reliable informant who previously had given the Little Rock Police Department information leading to defendant's arrest and conviction for possession of marijuana, again informed the department of the time and place of defendant's arrival by airplane and the fact that defendant was traveling with a green suitcase of a given

description which contained marijuana. Defendant arrived as stated, selected from the baggage area a green suitcase matching the description given, and left with a third party. They placed the suitcase in a taxi which defendant had waiting. The officers stopped the taxi. Upon request, the taxi driver opened the trunk, and, without further permission, the officers opened the suitcase. Ten plastic bags containing 9.3 pounds of marijuana were found. Defendant was convicted of possession of marijuana with intent to deliver. The Arkansas Supreme Court found that the officers had probable cause to believe that the suitcase contained marijuana but that there were no exigent cirumstances since both defendant and suitcase were under their control and could have been secured while a warrant was obtained.

Although Sanders might have application to the Kalamazoo search under other circumstances, the luggage in question already had been properly seized and searched in Arizona. It was clearly identified as such by the officers' actions and insertions into each suitcase. The luggage continued under control of the Arizona police. The Kalamazoo police properly arrested defendant. Their looking into one suitcase after a prior search, seizure and arrest--probably to ascertain that the marijuana still was there--does not serve to vacate or taint the initial search. It had no bearing upon any right of which defendant was then possessed. There is no prohibition against looking any number of times into a suitcase legally searched and seized.

The Kalamazoo officers knew the luggage contained contraband because the officers

in Arizona had viewed the contraband and permitted the defendant to receive it in Kalamazoo as a controlled delivery. Controlled deliveries of contraband may serve useful in law enforcement. When such a delivery is made, through a constitutionally valid search followed by delivery, the subsequent search of the container following deliver, to insure the contraband has not been removed, is not subject to a constitutional objection on the basis that the search was made without a warrant, see United States v Andrews, 618 F.2d 646 (CA 10, 1980), cert. den., ___ U.S. ___; 101 S.Ct. 84, 66 L.Ed.2d 26 (1980); United States v Bulgier, 618 F.2d 472 (CA 7, 1980); United States v Ford, 525 F.2d 1308 (CA 10, 1975); Untied States v DeBerry, 487 F.2d 448 (CA 2, 1973).

In DeBerry, the facts were similar to those before us. A Los Angeles air

freight supervisor found 15 bricks of marijuana in a suitcase. Los Angeles police inspected the bag and relayed the information to New York authorities who placed it under surveillance upon arrival in New York. Although the Court ruled that there would have been time in 15 hours to obtain a warrant, the Court ruled the warrant was unnecessary because the suitcase was initially searched and seized in California. Likewise, one of the bricks was removed and marked and the suitcase marked with the officer's initials. The Court said:

> Even though the suitcase was then in transit, later in the luggage bin and later still in the freight room, it remained legally "seized" just as much as if it were under the actual physical control of the police. In fact, except for the time it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car * * * they were not making an initial

> seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes * * *. Accordingly, no warrant was required.

DeBerry is also similar to Waugh v State, 20 Md. App. 682, 318 A.2d 204 (1974), rev'd on other grounds 275 Md. 22, 338 A.2d 268 (1975), in which the Maryland Court of Special Appeals stated that it would have been impractical for the Arizona police to obtain a search warrant to open suitcases which were about to leave for Maryland. That court also rejected the argument that the police should have requested the airline to hold the luggage or that the police should have relied on the Maryland police to obtain a search warrant.

The same result was reached in Ford when the Court noted that the California officers had seized and marked a package and placed a business card in it, then had

notified Oklahoma City officers who arrested defendant. The Court found that the California officers' dominion over the contraband remained unbroken and that the official seizure of the contraband had taken place in San Francisco.

V

Defendant argues that the Tucson search fails the Fourth Amendment test because it may have been possible for the officers to have seized the suitcases upon identifying the odor or marijuana and then to have arrested defendant prior to the plane's actual departure. Although several reasons for failing to attempt hurried arrest in Tucson under these circumstances are apparent, time constraints on the officers in the baggage room with the plane about to depart, as well as danger to the public inherent in a hastily

contrived arrest in a crowded terminal or on the plane itself are probabilities. The record does not reveal the officer's reasoning for the judgement call, perhaps because neither party considered it to be significant. In my opinion, the officers acted reasonably under the pressure of time and consideration for all concerned. Whether an arrest could have been made, and, if so, without danger to the public, is a matter for conjecture. We are considering an ugly facet of the real world--drug traffic--in which acting upon mere conjecture and in haste can be fatal!

If reasonableness remains the touchstone for lawful search and seizure, the Tucson officers have passed the test.

Defendant also argues that the Arizona seizure and search was defective because of the ruling of the Court in People v Hilber, 403 Mich. 312, 269 N.W.2d 159

(1978), in which the majority acknowledged the separate odors of burned and unburned marijuana and concluded that the odor of burned marijuana alone was no evidence of the immediate presence so as to provide probable cause for a search. The case is inapposite to these facts involving the distinctive odor of unburned marijuana detected by narcotics officers experienced in such detection.

VI

The admission of the evidence seized in this case was not prohibited by Const. 1963, Art. 1 11, which provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provision of this section shall not be construed to bar from evidence in any criminal

> proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

On the facts herein, I find nothing in Const. 1963, Art. 1, 11, which would justify extending the protections of the state Constitution beyond the protections of U.S. Const., Am. IV, so as to require the exclusion of the challenged evidence.

VII

For the reasons stated by the Court of Appeals, there was no reversible error concerning the res gestae witness issue raised by defendant.

In summary, the Tucson narcotics agents had probable cause to believe that defendant's two suitcases contained marijuana. Under the exigencies of defendant's imminent departure of an

airplane leaving the jurisdiction and the short time in which to act, a warrantless search was justified. The well-identified suitcases and contents remained in continuous control of the Tucson police officers and under surveillance of the Kalamazoo officers until the arrest was made. In my opinion, the search, seizure and arrest having been lawful, the subsequent check into one suitcase by the Kalamazoo police violated no constitutional right of defendant.

I would affirm defendant's conviction.

## APPENDIX B FOOTNOTES
## MAJORITY OPINION

1. U.S. Const., Ams. IV, XIV; Const. 1963, Art. 1, 11.

2. United States v Chadwick, 433 U.S. 1, 97 S.Ct, 2476, 53 L.Ed.2d 538 (1977); People v Crawl, 401 Mich. 1, 257 N.W.2d 86 (1977) (opinion by Levin, J.)

## APPENDIX B FOOTNOTES
## DISSENTING OPINION

1. M.C.L. 335.341(1)(c); M.S.A. 18.1070(41)(1)(c), now M.C.L. 333.7401(1); M.S.A. 14.15(7401)(1).

2. People v Plantefaber, 408 Mich. 898 (1980).

3. See United States v Van Lewis, 409 F. Supp. 535 (E.D.Mich., 1976), aff'd 556 F.2d 385 (CA 6, 1977), for a general description of a courier profile system's criteria and procedures.

4. See Arkansas v Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); United States v Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed2d 538 (1977); United States v United States District Court, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972).

5. See United States District Court, supra; Coolidge v New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Johnson v United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); People v Beavers, 393 Mich. 554, 566, 227 N.W.2d 511 (1975).

6. See also United States v Ogden, 485 F.2d 536 (CA 9, 1973); Hernandez v United States, 353 F.2d 624 (CA 9, 1965).

RECEIVED
SEP 17 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT FOR THE UNITED STATES

Re: Michigan v. Cornelius Plantefaber
No. 80-1876

MOTION TO PROCEED
IN FORMA PAUPERIS

I respectfully request that I be permitted to proceed in Forma Pauperis in my case. I have had to pay a lot of money to my lawyers to defend me at the trial, and for two appeals in Michigan. I understand that the Prosecuting Attorney has asked the Supreme Court of the United States to reverse the decision of the Michigan Supreme Court that was in my favor. I do not have the funds to defend myself any further, so I must ask for assistance to defend myself.

I ask that the United States Supreme Court not reverse the devision of the Michigan Supreme Court in my favor. I can't afford another legal brief to explain my defense. I have discussed everything with my attorneys, and they assure me that the Michigan Supreme Court was correct in deciding in my favor. The only papers I have that support my defense is the legal brief my attorneys filed in the Michigan Supreme Court and what the Court said when it decided my case. I ask that the United States Supreme Court consider these when deciding my case. I have enclosed these with my motion.

Respectfully,

Cornelius Plantefaber

Dated:

SUPREME COURT FOR THE UNITED STATES

Re: Michigan v. Cornelius Plantefaver
No. 80-1876

AFFIDAVIT OF INDIGENCY
FROM CORNELIUS PLANTEFABER

Cornelius Plantefaber, being first duly sworn, says as follows:

1. That I have had to spend a great deal of money to pay my attorneys to defend me at my trial, and to appeal my case twice in the State of Michigan.

2. The Prosecuting Attorney is appealing my case to the United States Supreme Court, and I no longer have the money to defend myself any further.

Cornelius Plantefaber

Subscribed and sworn to before
me this 14th day of September, 1981.

Notary Public, Kalamazoo County, Mi.
My Commission Expires: Sept. 5 1984

NOTE: Where possible, a syllabus (headnote) such as this will be released at the time the opinion is released. This syllabus is not a part of the opinion of the Court but has been written by the Supreme Court Reporter as a summary of the case for the convenience of readers. See United States v Detroit Lumber Co, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

RECEIVED MAR 1 1 1981

PEOPLE v PLANTEFABER

Docket No. 63745. Argued October 8, 1980 (Calendar No. 9).--Decided March 10, 1981.

Cornelius Plantefaber was convicted in Kalamazoo Circuit Court, Donald T. Anderson, J., of possession of marijuana with intent to deliver. Police officers who had been conducting general surveillance at the Tucson International Airport watched the defendant as he entered the terminal and concluded that he fitted a descriptive "profile" used by police to identify persons who might be trafficking in drugs. Upon that conclusion, other police officers smelled the seams of the defendant's two suitcases as they passed by on a baggage conveyor in the airline's baggage room and concluded that they detected the odor of marijuana and talcum powder. They opened and searched the suitcases without obtaining a search warrant, found that the suitcases contained bricks of marijuana, kept one of the bricks, and then resealed the suitcases, which were loaded into a plane departing for Kalamazoo, Michigan. The Arizona police officers watched the defendant leave on the same plane and reported the matter to the Kalamazoo Police Department. More than six hours later, the Kalamazoo police officers stopped the taxicab in which the defendant was riding and arrested him after he left the Kalamazoo airport. The officers took the defendant's suitcases out of the taxi, searched them, and seized the marijuana without a search warrant. The trial court denied the defendant's motion to suppress the marijuana as evidence obtained by an unconstitutional search and seizure. The Court of Appeals, D. F. Walsh, P.J., and M. J. Kelly and Oppliger, JJ., affirmed on the theory that the search in Michigan was a continuation of the search begun in Arizona, and that the fact that the suitcases were about to depart on the flight to Kalamazoo was an exigent circumstance in Arizona which excused the constitutional requirement of a search warrant (Docket No. 78-2022). Defendant appeals. In an opinion by Justice Kavanagh, joined by Justices Levin, Fitzgerald, Ryan, and Moody, the Supreme Court held:

1. Whether there was but one seizure or not and whether it was in Arizona or in Michigan, the question is the propriety of the search of the luggage after its seizure. The minimum constitutional guarantees require that a search of personal luggage must be attended by probable cause and either a warrant or exigent circumstances. In this case the absence of a warrant reduces the issue to the existence of probable cause and exigent circumstances. Conceding, arguendo, that the exigent circumstances permitted the seizure of the luggage without a search warrant, the question is whether there were exigent circumstances which permitted the search of the luggage after the seizure.

2. The Arizona police officers could not have searched the luggage constitutionally after they had taken it in their custody by removing the suitcases from the baggage conveyor because the claimed exigency of mobility had passed upon the seizure of the suitcases. Even if it is conceded, arguendo, that the custody of the luggage by the Arizona police officers continued and invested the Michigan police officers with the authority to maintain the custody, when the Michigan officers removed the suitcases from the taxicab there was no exigency in Michigan to permit a search without a warrant. The exigency of mobility must be assessed immediately before the search, after the police have seized the object to be searched and have it securely within their control. Once the officers have seized luggage, as they did here, the extent of its mobility is in no way affected by the place from which it was taken.

3. The Supreme Court of the United States has explained that the owner's principal interest in the privacy of his locked luggage is not in the luggage itself, which is exposed to public view, but in its contents. A search of the interior is, there-

fore, a far greater intrusion into values protected by the Fourth Amendment than the impoundment of the luggage. The seizure did not diminish the defendant's legitimate expectation that the contents of the luggage would remain private. Where the police have custody and control over personal luggage a search without a warrant cannot be justified on the exigent circumstance of the mobility of the luggage. Therefore, the evidence in this case should have been suppressed. This holding obviates the need for discussion of the other issues.

Justice Williams concurred because the Kalamazoo police had sufficient notice to get a warrant.

Reversed.

Chief Justice Coleman, dissenting, would affirm the defendant's conviction.

1. The warrant provision of the Fourth Amendment, requiring review by a neutral and detached magistrate, is the primary protection against the risk of unreasonable assertions of executive authority. However, one exception to the warrant requirement is when exigent circumstances do not permit sufficient time to obtain a warrant. The fact that the defendant was not in the officers' custody in Arizona and was boarding an airplane to leave the jurisdiction constituted exigent circumstances relieving the officers from complying with the warrant requirement. By the time a warrant could have been obtained the defendant would have been gone. He was not under arrest and his plane was about to depart. It is not reasonable to seize the proof of criminality but to suffer the criminal to escape. In order to make sense, "exigent circumstances" must encompass mobility of the trafficker as well as the contraband in traffic. The word unreasonable is sometimes overlooked in consideration of the prohibition against "unreasonable searches and seizures".

2. The defendant's appearance, activities, and behavior upon entering the terminal in Tucson provided a reasonable basis for the officers to pay special attention to his luggage. The officers, then being in a position in which they had a right to be, detected the odor of marijuana emanating from the suitcases and observed talcum powder on the outside of one suitcase. These perceptions were the equivalent of plain-view observations. Considering the officers' experiences with hundreds of similar cases and all the circumstances surrounding these observations, they had probable cause to believe that contraband was contained in the luggage. Also, because the luggage was scheduled to be removed from the jurisdiction unless immediate action was taken, the officers were justified in seizing the luggage. The area of disagreement is over the propriety of the officers' actions after they seized the luggage.

3. The suitcases were already checked for passage to Kalamazoo and the plane about to depart with the defendant on it. There was no time to seek a search warrant. The existence of probable cause and the exigent circumstance of the defendant's imminent departure from Arizona rendered the warrantless search and seizure reasonable. The luggage was clearly identified as properly seized and searched by the officers' actions and by the insertion into the suitcases of scraps of notebook paper with identifying data, and of identification marks on one brick of marijuana. The luggage continued under control of the Arizona police. The Kalamazoo police properly arrested the defendant. Their looking into one suitcase after a prior search, seizure, and arrest does not serve to vacate or taint the initial search. It had no bearing upon any right of which defendant was then possessed. There is no prohibition against looking any number of times into a suitcase legally searched and seized.

4. The Kalamazoo officers knew the luggage contained contraband because the officers in Arizona had viewed the contraband and permitted the defendant to receive it in Kalamazoo as a controlled delivery. Controlled deliveries of contraband may serve useful functions in law enforcement. When such a delivery is made, through a constitutionally valid search followed by delivery, the subsequent search of the container following delivery, to insure the contraband has not been removed, is not

subject to a constitutional objection on the basis that the search was made without a warrant.

5. Defendant argues that the Tucson search fails the Fourth Amendment test because it may have been possible for the officers to have seized the suitcases upon identifying the odor of marijuana and then to have arrested defendant prior to the plane's actual departure. The record does not reveal the officer's reasoning for failing to arrest the defendant in Tucson, perhaps because neither party considered it to be significant, but the officers acted reasonably under the pressure of time and consideration for all concerned. Whether an arrest could have been made, and, if so, without danger to the public, is a matter for conjecture. Acting upon mere conjecture and in haste in cases of drug trafficking can be fatal. If reasonableness remains the touchstone for lawful search and seizure, the Tucson officers have passed the test. There is nothing in the Michigan Constitution which would justify extending its protections on these facts beyond the protections of the Fourth Amendment to require the exclusion of the challenged evidence.

91 Mich App 764; 283 NW2d 846 (1979) reversed.

9/October, 1980

STATE OF MICHIGAN

SUPREME COURT

FILED MAR 1 0 1981

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v — No. 63745

CORNELIUS PLANTEFABER,

Defendant-Appellant.

---

BEFORE THE ENTIRE BENCH

KAVANAGH, J.

This case involves the constitutionality of a warrantless search of personal luggage. Minimum constitutional guarantees provide that a search of personal effects must be attended by probable cause[1] and either a warrant or exigent circumstances.[2] The absence of a warrant in this case reduces the focus of our constitutional assessment to the existence vel non of probable cause and exigent circumstances. Conceding, arguendo, the exigent circumstances authorizing the warrantless seizure of the luggage, there were no exigent circumstances authorizing its warrantless search.

The evidence thus obtained should have been suppressed.

On July 26, 1973, narcotics officers of the Tucson, Arizona Police Department were conducting general surveillance at the Tucson International Airport. Their surveillance consisted of observing people and luggage for possible narcotics activity. At 10:45 p.m. two officers observed defendant as he entered the terminal. The officers testified that defendant appeared nervous and that his general demeanor fit a "profile" which the officers had come to associate with people who traffic in drugs. Other police officers in a private TWA baggage room smelling all the luggage which passed by on a conveyor were told to pay special attention

to defendant's luggage. Two police officers placed their noses along the seams of defendant's two suitcases as they passed by along the TWA baggage conveyor. Concluding that they smelled marijuana and talcum powder, the officers removed both suitcases from the conveyor.

With the use of tools the officers broke the lock on one suitcase and searched its contents, discovering 14 bricks of marijuana. Two bricks were removed and marked, one being kept by the police officers in Arizona and never offered in evidence and the other replaced in the suitcase. The other suitcase was pried open at a corner revealing its contents of marijuana. The officers did not retain custody of the suitcases but closed, sealed and placed them back on the TWA conveyor for loading into the departing plane. One officer returned to the main concourse to confirm defendant's destination as Kalamazoo, Michigan.

The Tucson narcotics officers chose not to arrest defendant but rather to relay all of their information to the Kalamazoo police department. Defendant was observed at the Kalamazoo airport as he disembarked from a plane approximately six hours later. Kalamazoo police officers observed defendant as he collected his luggage and made his way out of the terminal and into a taxicab. The officers testified that they did not arrest defendant as he approached the taxi because a bus full of children was arriving. The officers waited until the cab left the airport and stopped it as it drove on a nearby road. The defendant was arrested, and his luggage taken out of the taxi and searched immediately to reveal marijuana.

Neither the Tucson police officers nor the Kalamazoo police officers had obtained or even attempted to obtain a search warrant.

On appeal defendant-appellant contends that the trial court erred in not suppressing the marijuana as a product of an invalid search and seizure. Neither search was carried

out pursuant to a warrant and defendant argues that once the police seized his luggage, whether in Arizona or in Michigan, they should have retained custody thereof until a warrant was obtained.

The prosecution contends that the trial court was correct in refusing to suppress the marijuana. Appellee argues that there was only one search involved. What occurred in Kalamazoo was not a separate search and seizure, it argues, but only a reassertion of control which had been obtained in Arizona. The initial intrusion in Arizona is argued as justified by probable cause and exigent circumstances. The similarity between the defendant's demeanor and the drug profile along with the odor of unburned marijuana and the presence of talcum powder are argued as providing probable cause to believe defendant's luggage contained contraband. The impending departure of defendant's flight to Kalamazoo is argued as an exigent circumstance. The prosecutor further contends that because the Tucson police relayed their information to the Kalamazoo police the authorities never relinquished custody of defendant's luggage and thus what occurred in Kalamazoo was not a separate search but merely a continuation of the valid search which began in Arizona.

This argument misses the point.

Whether there was but one seizure or not and whether it was in Arizona or Michigan, the question before us is the propriety of the search of the luggage after its seizure.

The Arizona police could not have searched the luggage once they had it in their custody and control by removing it from the conveyor, because the claimed exigency of mobility had passed upon their seizure of the luggage. United States v Chadwick, 433 US 1; 97 S Ct 2476; 53 L Ed 2d 538 (1977). If it is conceded, arguendo, that their custody continued and invested the Michigan police with authority to maintain that custody, when the Michigan police removed the suitcases from the taxi there was no exigency of mobility or otherwise authorizing a warrantless search in Michigan.

9/C ober, 1980

In Arkansas v Sanders, 442 US 753, 763; 99 S Ct 2586; 61 L Ed 2d 235 (1979), the Court observed:

"But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search -- after the police have seized the object to be searched and have it securely within their control. See 433 US, at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken." (Footnote omitted; emphasis added.)

The philosophy behind this holding is set forth in Chadwick where the Court explained its prior holding in Chambers v Maroney, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970):

"Respondent's principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.

"It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in Chambers unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage." 433 US 1, 13-14, fn 8.

When the police have custody and control over personal luggage a warrantless search cannot be justified on the basis of the exigent circumstance of mobility.

The evidence here should have been suppressed.

Our holding on this point obviates the need for discussion of the other issues regarding asserted failure to produce a res gestae witness.

Reversed.

Thomas Giles Kavanagh
John D. Fitzgerald
Jean L. Ross
Blair Moody, Jr.
Charles L. Levin

I concur because the Kalamazoo police had sufficient notice to get a warrant.

Theodore Levin

**FOOTNOTES**

1

US Const, Ams IV, XIV; Const 1963, art 1, § 11.

2

United States v Chadwick, 433 US 1; 97 S Ct 2476; 53 L Ed 2d 538 (1977); People v Crawl, 401 Mich 1; 257 NW2d 86 (1977) (opinion by Levin, J.)

Best Copy Available

9/October 1980

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No 63745

CORNELIUS PLANTEFABER,

Defendant-Appellant.

---

BEFORE THE ENTIRE BENCH

COLEMAN, C.J. (dissenting)

Defendant was convicted of possession of marijuana with intent to deliver.[1] The Court of Appeals affirmed his conviction. This Court granted leave to appeal[2] and the majority concludes that defendant's conviction must be reversed because of what is deemed an unconstitutional search of defendant's luggage in Kalamazoo, Michigan. I dissent from this holding, having concluded that the marijuana introduced into evidence was not obtained in violation of defendant's constitutional rights. The search and seizure in Tucson, Arizona was constitutional and the luggage remained in continuing control of the police through the time of arrest in Kalamazoo.

I

The entire Arizona episode took place within 32 minutes.

On July 26, 1973, officers of the Tucson, Arizona, narcotics squad were at the Tucson airport observing passengers for possible narcotics activity. Tucson apparently is a busy crossroad for drug traffic, and surveillance was routine. At 10:45 p.m., two officers observed defendant as he entered the terminal. They saw defendant hurry to the line at the American Airlines counter carrying two heavy suitcases. When defendant learned

the flight he wanted was full, he ran to the TWA counter. He had held his luggage in his hands during this period. He purchased a ticket for a flight via TWA to Kalamazoo leaving at 11:17 p.m. and checked his luggage. Then defendant sat down in a chair next to Officer Fragoso, who was in plainclothes. After a short exchange, defendant walked around the terminal, constantly looking about him, until he boarded his flight.

The experienced narcotics officer concluded that defendant fit the established "profile" of persons possibly involved in narcotics trafficking:[3] The defendant had arrived at the airport hurriedly, just before a flight and without a ticket. At a second counter he purchased a ticket for an imminent flight. His luggage had appeared to be heavier than usual, causing him to hunch his shoulders but he did not rest it on the floor. He appeared nervous, repeatedly looked over his shoulder and around the room, and could or would not sit still. He talked rapidly when he conversed with the officer. Manner of dress and appearance were mentioned but did not receive much, if any, weight.

Because defendant appeared to fit the profile established by experience, Officer Fragoso told other officers who were in the baggage claim area to pay particular attention to defendant's luggage when it arrived on the conveyor belt. Several officers then detected an odor of marijuana emitting from the luggage and observed talcum powder on the outside of one suitcase. Talcum powder is widely used to mask the odor of marijuana. Because they had probable cause to believe that contraband was contained in the suitcases, the officers seized defendant's luggage, removing it from the conveyor belt.

The officers then opened one of defendant's suitcases. Inside they found 14 bricks of marijuana. The officers removed two bricks from the suitcase and marked them for identification. They kept one for evidentiary purposes and replaced the other. Then they repacked and eventually closed the suitcase.

They did not have sufficient time to open and inventory the other suitcase because defendant's flight was scheduled to leave. Instead, they pried open one edge, observed more bricks of marijuana and shut the suitcase. In each suitcase they placed a scrap from a page of a notebook with initials of two officers and the time and date. They replaced the suitcases on the conveyor and the luggage was loaded on the airplane. All of this took place in 32 minutes from defendant's entry into the airport until the plane's departure. The search and seizure took considerably less time.

The defendant made the flight without arrest but Officer Fragoso telephoned the Kalamazoo Police Department to notify them of the information they had obtained. Lieutenant Michael Moshier received the telephone call informing him of descriptive details of defendant and his luggage and results of the Arizona search and seizure.

When defendant disembarked from the airplane in Kalamazoo, an officer placed him under observation. The officer allowed defendant to pick up the two suitcases and carry them out to a taxicab. Because of a busload of children in that area, no arrest was made there. Defendant left the airport in the cab with the police following. The officers stopped the taxicab as soon as they could without creating unnecessary danger to others. They arrested defendant and removed the suitcases from the trunk. They then opened one of the suitcases, exposing the marijuana.

Defendant was convicted in a bench trial of possession of marijuana with intent to deliver. He was sentenced to three years' probation and ordered to pay court costs of $500.

II

The main issue on appeal is the constitutionality of the officers' actions in Tucson and Kalamazoo, in searching and seizing defendant's suitcases.

US Const, Am IV, provides two significant protections

for the security and privacy of persons. It protects against "unreasonable searches and seizures". Also, the amendment has been construed to require that most searches of private property be performed pursuant to a search warrant.[4] The warrant provision, requiring review by a neutral and detached magistrate, is the primary protection against the risk of unreasonable assertions of executive authority.[5]

Nevertheless, there are several well-recognized exceptions to the warrant requirement. In cases in which the societal cost of obtaining a warrant, such as dangers to law-enforcement officers or others or the risk of loss or destruction of evidence, outweighs the reasons for requiring a warrant, a warrant may not be required, see United States v United States District Court, 407 US 297, 318; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

One exception to the warrant requirement is when exigent circumstances do not permit sufficient time to obtain a warrant, see Schmerber v California, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966).[6] The majority concludes that the circumstances surrounding the search of the luggage in Arizona did not remove the necessity of securing a warrant. I disagree, concluding that the fact that defendant was not in the officers' custody and was in the process of boarding an airplane to leave the jurisdiction constituted exigent circumstances relieving the officers from complying with the warrant requirement. By the time a warrant could have been obtained defendant would have been long gone. He was not under arrest and his plane was about to depart. It is not "reasonable" to seize the proof of criminality but suffer the criminals to escape. In order to make sense, "exigent circumstances" must encompass mobility of the trafficker as well as the contraband in traffic.

It appears to me that the word "unreasonable" is sometimes overlooked in consideration of the prohibition against "unreasonable searches and seizures".

III

The defendant's appearance, activities and behavior upon entering the terminal in Tucson provided a reasonable basis for the officers to pay special attention to defendant's luggage. However, this decision did not constitute a seizure subject to constitutional scrutiny. The officers, then being in a position in which they had a right to be, detected the odor of marijuana emanating from the suitcases and observed talcum powder on the outside of one suitcase. These perceptions were the equivalent of plain-view observations.

Considering the officers' experiences with hundreds of similar cases and all the circumstances surrounding these observations, I am persuaded that the officers had probable cause to believe that contraband was contained in the luggage. Also, because the luggage was scheduled to be removed from the jurisdiction unless immediate action was taken, the officers were justified in seizing the luggage. I think the majority would not conclude otherwise. Our area of disagreement is over the propriety of the officers' actions after they seized the luggage.

IV

Defendant relies heavily upon United States v Chadwick, 433 US 1; 97 S Ct 2476; 53 L Ed 2d 538 (1977). I agree with the Court of Appeals that the case supports the trial judge's ruling. Chadwick concerns a defendant, lawfully arrested, who was brought with his footlocker to the Federal Building. There, the officers searched the footlocker without a warrant. The Court held that, because defendant was under arrest and in custody, no exigent circumstances were present to excuse a warrantless search.

Such is not the case before the Court. The suitcases were already checked for passage to Kalamazoo (with one stopover) and the plane about to depart with defendant on it. There was no time to seek a search warrant. The existence of probable cause and the exigent circumstance of defendant's imminent

departure from Arizona rendered the warrantless search and seizure "reasonable".

Arkansas v Sanders, 442 US 753; 99 S Ct 2586; 61 L Ed 2d 235 (1979), concerns a similar situation, but with some different facts. A reliable informant who previously had given the Little Rock Police Department information leading to defendant's arrest and conviction for possession of marijuana, again informed the department of the time and place of defendant's arrival by airplane and the fact that defendant was traveling with a green suitcase of a given description which contained marijuana. Defendant arrived as stated, selected from the baggage area a green suitcase matching the description given, and left with a third party. They placed the suitcase in a taxi which defendant had waiting. The officers stopped the taxi. Upon request, the taxi driver opened the trunk and, without further permission, the officers opened the suitcase. Ten plastic bags containing 9.3 pounds of marijuana were found. Defendant was convicted of posssession of marijuana with intent to deliver. The Arkansas Supreme Court found that the officers had probable cause to believe that the suitcase contained marijuana but that were were no exigent circumstances since both defendant and suitcase were under their control and could have been secured while a warrant was obtained.

Although Sanders might have application to the Kalamazoo search under other circumstances, the luggage in question already had been properly seized and searched in Arizona. It was clearly identified as such by the officers' actions and insertions into each suitcase. The luggage continued under control of the Arizona police. The Kalamazoo police properly arrested defendant. Their looking into one suitcase after a prior search, seizure and arrest -- probably to ascertain that the marijuana still was there -- does not serve to vacate or taint the initial search. It had no bearing upon any right of which defendant was then possessed. There is no prohibition against looking any number of times into a suitcase legally searched and seized.

The Kalamazoo officers knew the luggage contained contraband because the officers in Arizona had viewed the contraband and permitted the defendant to receive it in Kalamazoo as a controlled delivery. Controlled deliveries of contraband may serve useful functions in law enforcement. When such a delivery is made, through a constitutionally valid search followed by delivery, the subsequent search of the container following delivery, to insure the contraband has not been removed, is not subject to a constitutional objection on the basis that the search was made without a warrant, see United States v Andrews, 618 F2d 646 (CA 10, 1980), cert den ____US____; 101 S Ct 84; 66 L Ed 2d 26 (1980), United States v Bulgier, 618 F2d 472 (CA 7, 1980), United States v Ford, 525 F2d 1308 (CA 10, 1975), United States v DeBerry, 487 F2d 448 (CA 2, 1973).

In DeBerry, the facts were similar to those before us. A Los Angeles air freight supervisor found 15 bricks of marijuana in a suitcase. Los Angeles police inspected the bag and relayed the information to New York authorities who placed it under surveillance upon arrival in New York. Although the Court ruled that there would have been time in 15 hours to obtain a warrant, the Court ruled the warrant was unnecessary because the suitcase was initially searched and seized in California. Likewise, one of the bricks was removed and marked and the suitcase marked with the officer's initials. The Court said:

> "Even though the suitcase was then in transit, later in the luggage bin and later still in the freight room, it remained legally 'seized' just as much as if it were under the actual physical control of the police. In fact, except for the time it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car * * * they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes * * *. Accordingly, no warrant was required."

DeBerry is also similar to Waugh v State, 20 Md App 682; 318 A2d 204 (1974), rev'd on other grounds 275 Md 22; 338 A2d 268 (1975), in which the Maryland Court of Special Appeals stated that it would have been impractical for the

Arizona police to obtain a search warrant to open suitcases which were about to leave for Maryland. That court also rejected the argument that the police should have requested the airline to hold the luggage or that the police should have relied on the Maryland police to obtain a search warrant.

The same result was reached in Ford when the Court noted that the California officers had seized and marked a package and placed a business card in it, then had notified Oklahoma City officers who arrested defendant. The Court found that the California officers' dominion over the contraband remained unbroken and that the official seizure of the contraband had taken place in San Francisco.

V

Defendant argues that the Tucson search fails the Fourth Amendment test because it may have been possible for the officers to have seized the suitcases upon identifying the odor of marijuana and then to have arrested defendant prior to the plane's actual departure. Although several reasons for failing to attempt hurried arrest in Tucson under these circumstances are apparent, time constraints on the officers in the baggage room with the plane about to depart, as well as danger to the public inherent in a hastily contrived arrest in a crowded terminal or on the plane itself are probabilities. The record does not reveal the officer's reasoning for that judgment call, perhaps because neither party considered it to be significant. In my opinion, the officers acted reasonably under the pressure of time and consideration for all concerned. Whether an arrest could have been made, and, if so, without danger to the public, is a matter for conjecture. We are considering an ugly facet of the real world -- drug traffic -- in which acting upon mere conjecture and in haste can be fatal.

If reasonableness remains the touchstone for lawful search and seizure, the Tucson officers have passed the test.

Defendant also argues that the Arizona seizure and search was defective because of the ruling of this Court in People v Hilber, 403 Mich 312; 269 NW2d 159 (1978), in which the

majority acknowledged the separate odors of burned and unburned marijuana and concluded that the odor of burned marijuana alone was not evidence of the immediate presence so as to provide probable cause for a search. The case is inapposite to these facts involving the distinctive odor of unburned marijuana detected by narcotics officers experienced in such detection.

VI

The admission of the evidence seized in this case was not prohibited by Const 1963, art 1, § 11, which provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

On the facts herein, I find nothing in Const 1963, art 1, § 11, which would justify extending the protections of the state Constitution beyond the protections of US Const, Am IV, so as to require the exclusion of the challenged evidence.

VII

For the reasons stated by the Court of Appeals, there was no reversible error concerning the res gestae witness issue raised by defendant.

In summary, the Tucson narcotics agents had probable cause to believe that defendant's two suitcases contained marijuana. Under the exigencies of defendant's imminent departure on an airplane leaving the jurisdiction and the short time in which to act, a warrantless search was justified. The well-identified suitcases and contents remained in continuous control of the Tucson police officers and under surveillance of the Kalamazoo officers until the arrest was made. In my opinion, the search, seizure and arrest

having been lawful, the subsequent check into one suitcase by the Kalamazoo police violated no constitutional right of defendant.

I would affirm defendant's conviction.

Mary S. Coleman

1

MCL 335.341(1)(c); MSA 18.1070(41)(1)(c), now MCL 333.7401(1); MSA 14.15(7401)(1).

2

People v Plantefaber, 408 Mich 898 (1980).

3

See United States v Lewis, 409 F Supp 535 (ED Mich, 1976), aff'd 556 F2d 385 (CA 6, 1977), for a general description of a courier profile system's criteria and procedures.

4

See Arkansas v Sanders, 442 US 753; 99 S Ct 2586; 61 L Ed 2d 235 (1979), United States v Chadwick, 433 US 1, 9; 97 S Ct 2476; 53 L Ed 2d 538 (1977), United States v United States District Court, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

5

See United States District Court, supra, Coolidge v New Hampshire, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971), Johnson v United States, 333 US 10, 14; 68 S Ct 367; 92 L Ed 436 (1948), People v Beavers, 393 Mich 554, 566; 227 NW2d 511 (1975).

6

See also United States v Ogden, 485 F2d 536 (CA 9, 1973), Hernandez v United States, 353 F2d 624 (CA 9, 1965).

# STATE OF MICHIGAN
# IN THE SUPREME COURT
## ON APPEAL FROM THE COURT OF APPEALS

Judges Walsh, Kelly, Oppliger
(Circuit Court No. 733-00-115-FY —
Court of Appeals No. 78-2022)

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PEOPLE OF THE STATE OF MICHIGAN,
*Plaintiff-Appellee,*

vs.

Calendar No.
63745

CORNELIUS PLANTEFABER,
*Defendant-Appellant.*

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## BRIEF ON APPEAL
## DEFENDANT-APPELLANT

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## STATEMENT OF QUESTIONS INVOLVED

**I. WAS THE SEARCH AND THE SUBSEQUENT SEIZURE OF ITEMS FROM THE DEFENDANT-APPELLANT'S SUITCASES IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 11, OF THE MICHIGAN CONSTITUTION OF 1963?**

(a) Was the warrantless search and seizure of the Defendant-Appellant's suitcase in Arizona improper and invalid because there was insufficient probable cause to permit the search?

(b) Was there sufficient exigent circumstances in Arizona to allow the search of the Defendant-Appellant's suitcases without a warrant?

The Lower Court answered these questions "yes".

The Defendant-Appellant contends that the answer should be "no".

The Plaintiff-Appellee contends that the answer should be "yes".

**II. SHOULD THE EVIDENCE OBTAINED FROM THE DEFENDANT-APPELLANT'S SUITCASES, AS A RESULT OF THE MICHIGAN SEARCH, HAVE BEEN SUPPRESSED, AS IT WAS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE AND IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION II OF THE MICHIGAN CONSTITUTION OF 1963?**

The Lower Courts answer these questions "no".

The Defendant-Appellant contends that the answer should be "yes".

The Plaintiff-Appellee contends that the answer should be "no".

**III. DID THE TRIAL COURT ERR IN NOT ORDERING THE ENDORSEMENT AND THE PRODUCTION OF OFFICER MICHAEL KLICK AS A RES GESTAE WITNESS AND DETERMINING THAT IF CALLED HIS TESTIMONY WOULD BE CUMULATIVE?**

The Lower Courts answer these questions "no".

The Defendant-Appellant contends that the answer should be "yes".

The Plaintiff-Appellee contends that the answer should be "no".

## STATEMENT OF FACTS

At the beginning of the defendant-appellant's case the defendant-appellant's charge was limited to possession with intent to deliver marijuana (App. p. 38(a)). This matter was tried as a bench trial.

The evidence showed observations of police officers in Arizona regarding the defendant's suitcases and a subsequent search of the suitcases in Arizona and an arrest and search in Michigan.

The testimony showed that a Detective Fragoso was in the Tucson airport on a general surveillance detail. Detective Fragoso testified that he began to observe the defendant-appellant because he appeared to him to be nervous (App. pgs. 45(a), 47(a)) and because he spoke rapidly (App. p. 48(a)) and that he had come to believe that people in that same age group who dressed in a similar fashion had something to do with drugs (App. pgs. 48(a), 49(a)). Detective Glen Hendrick of the Tucson Police Department testified that he also observed the defendant-appellant's behavior which he believed to be strange (App. pgs. 51(a), 53(a)) and that he observed the defendant-appellant check two pieces of luggage in before his flight and the defendant's luggage was then put on a conveyor belt and went down to the TWA baggage area (App. p. 54(a)). Detective Hendrick testified that he then told other officers, who were in the baggage claim area, to pay special attention to the defendant-appellant's bags when they arrive on the conveyor belt. (App. pgs. 55(a), 56(a)).

Testimony of other officers that day indicated that they were in the area for the particular purpose of smelling all the luggage and bags that came down into the baggage area (App. pgs. 72(a), 76(a)). While in the baggage area Detective Hendrick along with other officers smelled the bags (App. pgs. 56(a), 72(a)) determined what he believed to be mari-

juana and talcum powder. Detective Hendrick then ordered several officers to seize the suitcases and open and search them (App. pgs. 58(a)-60(a)). Detective Hendrick testified that they found fourteen bricks of what they believed to be marijuana (App. p. 60(a)). A brick was then taken out of the bag for purposes of evidence. The brick that was taken out was not submitted in this case (App. p. 67(a)). The officer stated that he did not have a search warrant (App. p. 65(a)). Both Officer Hendrick and Officer Sanders stated that they were positive the bags contained marijuana *before* the bags were opened (App. pgs. 68(a)-69(a), 78(a)-79(a)). Detective Hendrick testified that he could smell marijuana as far away as three blocks and that he has never made a mistake (App. pgs. 67(a), 68(a), 69(a).

The officers admitted that the baggage control area was under the control of TWA and is not open to the general public (App. pgs. 63(a), 65(a)). The evidence further indicated that after the bags had been searched the bags were then closed and given back to the TWA people and then were allowed to be put on the TWA plane (App. p. 80(a)).

After the bags had been opened the officer testified that they wanted to verify that the defendant-appellant, who had had the subject bags in question, was going to board his flight. Detective Hendrick testified that he again saw the defendant-appellant, subsequent to the opening of the bags, going down the American concourse. The defendant-appellant and Detective Hendrick exchanged conversation, and the Detective observed the defendant-appellant board his flight and leave, (App. p. 61(a)).

Lieutenant Moshier of the Kalamazoo Police Department testified that he received a telephone call from a Detective Fragoso from Tucson and that he described to him on the phone a particular individual and two suitcases that were allegedly on the way to Kalamazoo from Arizona (App. pgs.

81(a)-82(a)). Lieutenant Moshier stated that he then relayed this information on to an Officer Loney (App. pgs. 84(a)-86(a)).

Officer Wayne Loney verified that he received information from Lieutenant Moshier at his office. An objection was made to the admission of the conversation by the defendant-appellant, but was overruled (App. p. 55(a)). Loney testified that he saw the defendant-appellant get off the plane and talk to people in the terminal area and that he ascertained what two suitcases were defendant-appellant's. That he then allowed the defendant-appellant to pick up the suitcases, carry them out of the terminal to a taxicab and then put them in the cab (App. pgs. 89(a)-90(a)). The cab then left the terminal and was then subsequently stopped by a marked police car along with another car containing police officers. The officers approached the cab and arrested the defendant-appellant (App. pgs. 92(a), 102(a)). Officer Loney testified that he had the cab driver take the bags out while Officer Colby testified that Officer Loney removed the bags (App. p. 102(a)). The officers testified that they had advised the defendant-appellant of his rights and then opened one of the suitcases that was on the ground (App. pgs. 93(a)-95(a). The officers admitted that they never attempted to get a search warrant (App. p. 96(a)). The defendant-appellant did not give permission to open the bags (App. p. 97(a)). Officer Loney testified that the opening of the suitcases were not inventory searches, (App. p. 101(a)). Loney testified that he was already aware of what was in the suitcase.

The defendant-appellant had filed a pre-trial motion to suppress the contents of the suitcases which had been denied. The defendant-appellant realleged the basis of his motion to suppress which was again denied (see opinion of trial court, App. pgs. 8(a)-14(a)). During the course of the trial the defendant-appellant moved for dismissal for failure to en-

dorse and call one of the police officers, an agent Klick from Arizona (App. p. 107(a)). The court ruled that agent Klick was not a res gestae witness and even if he was his testimony would be cumulative in nature (App. p. 108(a)).

The defendant-appellant moved for directed verdict because of lack of any evidence as to intent to deliver a controlled substance, this was denied by the trial court. The court also ruled that there was no illegal search either in Arizona or in Michigan (App. pgs. 10(a)-13(a)).

The trial court on August 29, 1977 issued its opinion from the bench finding the defendant-appellant guilty of possession with intent to deliver marijuana. The defendant-appellant timely filed a motion for a further findings of fact, pursuant to GCR 517, which was subsequently denied by the trial court on April 11, 1978.

The defendant-appellant filed a motion in the Court of Appeals to remand the matter back to the trial court for the purposes of the consideration of a motion for new trial. On January 19, 1979 the court granted the motion to remand and sent this matter back to the trial court for the purposes of holding a hearing on a motion for new trial pursuant to *People* v *Robinson,* 390 Mich 629 (1973).

A Motion for New Trial was filed in accordance with the Court of Appeal's order in the trial court and a hearing was held on February 21, 1979. The trial court subsequently entered an order dated March 2, 1979 denying the motion for new trial.

On August 20, 1979 the Court of Appeals issued an opinion upholding the conviction of the defendant-appellant.

An Application for Leave to Appeal was filed and was granted by the court on April 17, 1980.

## ISSUE I

**THE SEARCH AND THE SUBSEQUENT SEIZURE OF ITEMS FROM THE DEFENDANT-APPELLANT'S SUITCASES WAS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 11, OF THE MICHIGAN CONSTITUTION OF 1963.**

**(a) The warrantless search and seizure of the defendant-appellant's suitcase in Arizona was improper and invalid because there was insufficient probable cause to permit the search.**

Testimony showed that on July the 26th, 1973 the defendant-appellant was about to take a flight from Tucson to Kalamazoo, Michigan. On that day, police officers were conducting a general search for illegal activities at the Tucson airport. An officer, John Sanders, testified that on that particular day they were "smelling all the bags for an indication of possible controlled substances". (App. p. 72(a)). Testimony showed that the defendant-appellant had apparently drawn the attention of an Officer Fragoso because the defendant-appellant appeared to be nervous. (App. pgs. 48(a), 49(a)). The defendant-appellant was also observed by a Detective Glen Hendrick, because of the same characteristics. (App. pgs. 50(a)-54(a). Officer Hendrick later admitted that various individuals, when they were late for flights would also appear to be nervous (App. pgs. 61(a), 62(a)). Later testimony would indicate that the officers became aware that the defendant-appellant apparently had been at the wrong airline counter and in fact was close to being late for his flight.

Officer Hendrick subsequently told an Officer Klick to pay particular attention to the defendant-appellant's luggage when it came down the conveyor belt from the ticket area. Officer Klick was one of the officers who was in the baggage area observing all the luggage that came through. The conveyor belt, upon which the defendant-appellant's luggage was put, went into the TWA baggage room which was an area not open to the public, but a private area used solely for TWA purposes (App. p. 63(a)). Apparently the officers had made a habit of using the private baggage areas, and in fact even had their tools there (App. p. 79(a)). When the defendant-appellant's suitcases came down the conveyor belt into the TWA area, both agents Hendrick and Sanders placed their noses on the seams of the suitcase and smelled (App. pgs. 56(a), 73(1)(a)). Both officers apparently believed they were able to smell the marijuana and the odor of talcum powder. The luggage was then seized. (App. pgs. 57(a), 64(a), 74(a)).

Officer Hendrick testified that he ordered that the luggage be seized and opened while Officer Sanders testified that he opened the luggage on his own initiative (App. pgs. 60(a), 64(a), 76(a)). Both officers confirmed that the reason for opening the suitcases at that time was their belief that they smelled marijuana and talcum powder, which they believed was sometimes used to mask the smell of marijuana (App pgs. 69(a), 80(a)). After the suitcases had been seized, they were then opened by the use of various tools and implements and a brown-like brick was found in the suitcases. The officers then continued a general search through the remainder of the suitcases. One of the bricks was taken out of the bag and detained in Arizona for evidence. That brick was not admitted into evidence in this case.

After the search of the suitcases they were then closed and returned to the custody and control of the TWA personnel. The suitcases were then put on the TWA plane (App. p.

80(a)). Officer Sanders testified that he believed that he had probable cause for a search warrant at that time and also for an arrest but he did not know who the person whose bags they were that he had then smelled and searched (App. p. 81(a)). It is clear that both Officer Hendrick and Officer Fragoso knew these bags had been searched, and Officer Hendrick was present with Officer Sanders in the baggage room. The officers also had testified that before they opened the bag they were positive that they contained marijuana (App. p. 80(a)). Later, Officer Hendrick would meet the defendant-appellant in the airline concourse and exchange conversation about flights. Officer Hendrick made no attempt to arrest defendant-appellant or to detain him or the flight.

After the defendant-appellant's flight had left Arizona, officers then sent a message, by telephone, to the Kalamazoo Police Department supposedly advising the Kalamazoo authorities of what had been found in the suitcases, and a description of the suitcases and the defendant-appellant. The question of the validity of the search and seizure in Kalamazoo is dealt with in a later issue.

The defendant-appellant attacked the validity of the Arizona search and seizure by raising pretrial motions to suppress which were denied by the trial court by Judge Sweet, who has since retired. The matter was then raised and fully explored during the course of the trial, and the evidence was admitted over vigorous objection. See opinion of trial court (App. pgs. 8(a)-14(a)).

It is relatively well-established that if evidence is inadmissible because it had been unlawfully obtained in either this state or in another state, the question of the admissibility in a criminal case in this state will then be addressed. ***People*** v ***Winterheld,*** 366 Mich 420 (1962). The Court of Appeals held, that in the instant case there was both probable cause and sufficient exigent circumstances allowing a search and

seizure of the defendant-appellant's luggage in Arizona. The Court of Appeals panel determined that the case of *United States* v *Chadwick*, 433 US 1; 97 S Ct 2476; 53 L Ed 2nd 538 (1977), supported the trial court's ruling determining the existence of sufficient probable cause for the officers' actions in Arizona. The defendant-appellant respectfully contends that the Court of Appeals mistakenly has put too much emphasis on the probable cause aspects of*Chadwick* and therefore neglected to recognize that *Chadwick* primarily deals with the determination of exigent circumstances for a personal luggage search and also a clearer determination of the peculiar status of luggage with regards to Fourth Amendment protections.

The defendant-appellant believes that the issues of probable cause and exigent circumstances should be dealt with separately. These concepts can be examined separately with regards to the lack of justification for the officers actions in this case.

In the case at bar, the Tucson officers were apparently conducting a general exploratory "smelling" search for marijuana or other controlled substances (App. p. 80(a)). The officers were clearing using a private area, not open to the public, for this investigation. It is generally recognized that exploratory general searches to find evidence of crimes are unconstitutional, *United States* v *Lefkowitz*, 285 US 452, 52 S Ct 420, 76 L Ed 877, (1932); *People* v *Crawl*, 401 Mich 1 (1977). See opinion of Justice Levin.

This entire episode began with a general search for some type of nefarious activities which then eventually focused upon the defendant-appellant's particular suitcases. It would seem from the very onset that the procedures utilized by the Arizona authorities were blatantly without justification. Furthermore, in view of the important rights that are involved in the instant case, being the expectation of privacy by an in-

dividual with regards to his private suitcases, the Arizona authorities actions are odious. An individual when he goes into an airport with locked suitcases should not have to expect that they will be subjected to scrutiny based upon self-serving criteria.

This Court found in *People* v *Hilber*, 403 Mich 312 (1978), that the odor of burnt marijuana did not provide reasonable and probable cause to believe that other marijuana or controlled substances were present. Granted, while the *Hilber* case involved marijuana, it would appear that the issue of unburned marijuana and its resulting odor has not been adequately presented to any Michigan Court except in the contest of this particular case. The defendant-appellant believes that the principles in *Hilber* should be applicable, however, to the facts of this case. The Court of Appeals panel stated that *Hilber* does show that the Justices of this Court did not disagree with regards to the probative value of unburned marijuana and its odor as evidence to determine the presence of marijuana. The defendant-appellant respectfully asks this Court to determine if in fact the Court of Appeals determination of *Hilber* was correct since this precise issue has not yet really been determined.

In a related situation, courts of this state have determined that in cases involving tracking dogs certain specific requirements must be found before the admission of such evidence is allowed. See *People* v *Norwood*, 70 Mich App 53 (1977), *People* v *Sands*, 82 Mich App 25 (1978); *People* v *McPherson*, 85 Mich App 341 (1979); *People* v *Perryman*, 89 Mich App 516 (1979). It is generally assumed that a canine sense of smell is far more highly developed than a human sense of smell. In most cases involving tracking dogs evidence, the particular tracking dog usually is assumed to have a far more highly experienced sense of smell than even the average dog. It does not take a very large jump of logic to determine

that the human sense of smell is not equivalent to the canine sense. Further, it would also seem equally fair that a dog should not, if you will, validate his own experience by his own self-serving statements.

The question then comes back to whether or not this type of activity that was engaged in the TWA baggage room should be approved? Does an individual who is late for a flight, who unfortunately happens to be young, expect that his private luggage will then be suspect, seized, smelled, and if necessary, broken into by police authorities? The defendant-appellant submits that respectfully the answer should be a clear no! Furthermore, should an citizen, regardless of age, expect that his luggage will be subjected to a smelling search? Further, woe be the individual who should happen to have shaving talc open in his luggage so that it might spill. The privacy rights as expanded upon by *Chadwick* should not be so frivolously done away with. On the basis of the evidence as submitted at this trial, the defendant-appellant respectfully submits that no probable cause existed for the officers' actions.

**(b) There was not sufficient exigent circumstances in Arizona to allow the search of the defendant-appellant's suitcases without a warrant.**

As previously mentioned, the Court of Appeals laid great stress upon its belief that *United States* v *Chadwick, supra,* is supportive of its position allowing the search of the defendant-appellant's suitcases in Arizona. The defendant-appellant respectfully submits that *Chadwick* is applicable to this situation, but not in the manner that the Court of Appeals has treated it. Rather, *Chadwick* is applicable more toward the question of existence or rather the lack of existence of exigent circumstances, than in the determination of the question of probable cause.

In *Chadwick, supra*, Amtrak railway authorities had observed the respondant loading a heavy brown footlocker onto a train bound for Boston. The railway peoples' suspicions were aroused when they noticed that the trunk was unusually heavy and appeared to be leaking talcum powder. Pursuant to advance notice, federal narcotic agents were on hand to meet the train and had a police dog who had been trained to detect marijuana with them. The dog then smelled the footlocker and indicated the presence of a controlled substance. One of the respondants then moved the footlocker outside to another respondant's waiting automobile. The respondants then put the footlocker into the trunk of the car and while the trunk of the car was still open, the agents arrested all three. The footlocker was then confiscated, taken to the Federal Building and then opened an hour and a half after the arrest. There had been no consent by the respondant nor an attempt to secure a search warrant. The Supreme Court subsequently disallowed the search.

It became necessary for the Supreme Court to further explain the principles of *Chadwick,* which it did in *Arkansas* v *Sanders,* US ; 99 S Ct 2586; L Ed 2nd (1979). *Arkansas* v *Sanders, supra*, attempted to further deliniate the existence of exigent circumstances that must be present to allow warrantless seachers. In *Sanders,* police officers were waiting when a plane arrived at an airport gate. Police watched as a respondant deposited some hand luggage in a waiting taxicab, returned to the baggage claim area and met another man who had also retrieved a bag that fit the description that the officers had of a bag that would be containing marijuana. That taxicab was then eventually stopped, the trunk of the vehicle was opened, the officers found the suitcase and without asking permission of anyone, the authorities opened the unlocked suitcase at the scene and found marijuana.

The Supreme Court in both *Chadwick* and *Sanders,* in essence declared a higher degree of privacy standards with regards to personal luggage than might be applied to other types of items. The Supreme Court recognized that by placing personal effects inside luggage and similar items, an individual has manifested an expectation that the contents would remain free from public scrutiny and examination. While it is true that both *Chadwick* and *Sanders* address themselves more closely to the situation that happened in Kalamazoo where the arrest was finally made, it is also pertinent because of the closeness of the factual situation with the questions raised in this particular issue. In view of the *Chadwick* pronouncements as to the higher degree of privacy recognized with regards to luggage, the exigent circumstances for the officers' actions should be narrowly construed. It should be noted that in the instant case the officers had control of this entire situation. One of the officers involved in this matter, Officer Hendrick, knew who the defendant-appellant was, knew whose luggage was being examined and knew when the defendant-appellant was leaving on his plane. The officers had the luggage in their possession in the TWA baggage room, the plane had not yet left, the defendant-appellant had not yet boarded the plane.

Since the officers were so sure that marijuana was contained in the luggage, then there was no reason why they could not have detained both the defendant-appellant and his luggage and obtained the necessary search warrants. It is curious that even after the bags had been searched, the defendant-appellant was then found upstairs in the airline concourse talking to one of the officers, yet no arrest took place.

The Court of Appeals cited several cases in support of its decision, all of which can be clearly distiguished from either the fact pattern of our case or the legal standpoint of our case.

In *Waugh* v *State*, 318 A 2nd 204, (1974), *rev'd*, 338 A 2nd 268, (1975), the *Waugh* panel basically relied upon the Supreme Court cases of *Carroll* v *United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (1925), and *Chambers* v *Maroney*, 399 US 42, 90 S Ct 1975, 26 L Ed 2nd 419 (1970), with regards to the distinction relating to exigent circumstances and mobility and the automobile. This distinction has been substantially altered by *Chadwick* because of the nature of the items being searched, i.e. a private suitcase. The *Chambers* and *Carroll* rationale with regards to our particular type of fact pattern has been fairly discredited because of the Supreme Court's pronouncements in *Chadwick* and *Sanders*. However, it is of great interest to note that the court in *Waugh* also considered in great detail the exigent circumstances of the warrantless search in Maryland, which was where the plane eventually landed and the defendant was eventually arrested; this will be dealt with later in Issue II.

The Court of Appeals also cited the case of *United States* v *Ford*, 525 F 2nd 1308, 1313 (10th Cir 1975), with regards to both probable cause and exigent circumstances. The defendant-appellant respectfully submits that the reliance upon *United States* v *Ford, supra*, is misplaced. In *Ford*, the search that was involved was a private search by airline authorities, not a governmental search. This distinction alone would appear to take this matter out of a fair comparison with the facts of our case. Furthermore, in *Ford*, the matter that was involved was a shoebox size package, not luggage as we have involved in the instant case. Also in *Ford*, the defendant who was arrested had not been putting his suitcases on a plane and also boarding the plane, but rather was an unknown individual who just gave the matter to American Airlines for shipment. Therefore, *Ford* turns upon matters clearly distinct in the facts situation in this case and its use in authority should therefore be limited.

*Chadwick* and *Sanders,* have not been definitively interpreted in Michigan as of yet. However, there is now a growing body of law that has interpreted either one or both of these cases throughout the federal system. In the Fifth Circuit, there is a case of *United States* v *Johnson,* 588 F 2nd 147 (1979). The *Johnson* case considers the *Chadwick* rationale with regards to probable cause and exigent circumstances. In *Johnson,* a car had entered the United States from Mexico and stopped at the border. Apparently marijuana seeds and the odor of marijuana was noted by the officers. The occupants were searched, one being a pilot, and the car was released, but then followed. Also, a plane that had been linked to the individuals was put under surveillance. The officers eventually observed the defendants loading luggage into the trunk of a car and then they went to the airport. At the airport the defendant met other defendants and began unloading luggage from the trunk and carrying luggage to the plane. This luggage included a white duffel bag and suitcases. The white duffel bag was put into the plane and the suitcases were put next to the plane. Customs officers approached the defendants and smelled the odor of marijuana eminating from the trunk of the car; they also saw three more bags still in the trunk, one with a tear in its side which revealed brown paper covered with a clear plastic. This type of wrapping was consistent with what the officers knew contained marijuana. The individuals were then put under arrest and they refused to consent to a search of the bags. The officers then returned to the plane and found a white duffel bag which was then searched and determined to be carrying marijuana. The remaining bags were later searched without a warrant at a DEA office.

The Fifth Circuit found that in view of the *Chadwick* decision, probable cause, which existed for the arrest, was simply not enough without a search warrant to allow a search of the luggage at the station and the duffel bag at the scene. The

reason being that it was clear that the duffel bag and the bags were in the exclusive control of the officers when the individuals had been arrested. Again, the question of probable cause as to what the bags contained was not the controlling factor as it was relatively clear that one of the bags itself was virtually open and marijuana was clearly visible, so there was very little doubt, as in our case, in either the Arizona or Michigan situation as to what existed in the bags themselves. Again, the Fifth Circuit stressed that probable cause simply was not enough to justify a search without a warrant. Exigent circumstances must be present before a warrantless search would be allowed. The Fifth Circuit pointed out that *Chadwick* stands for the proposition that a warrantless search of personal property should be the exception and not the rule and that where the authorities are in control of the situation, they must obtain a prior warrant before searching luggage or similar personal property either at the scene or back at the station house.

In the Eighth Circuit there is a case of *United States* v *Stevie*, 582 F 2nd 1175 (1978) certiorari denied, 443 US 911, 99 S Ct 3101. In *Stevie*, a tip from an informant advised officers that the defendant would be coming into the airport from either Phoenix or Las Vegas. Individuals came to meet the defendant in a rented station wagon. When the defendant got off the plane he acted in a suspicious manner; he did not talk with his companion when the officers had reason to believe they knew each other. The only time the individuals talked to one another was when they became wary; when it appeared that they were under surveillance. The defendant and others then got in the station wagon and proceeded on a four-lane expressway and periodically looked back at the officers who were behind them. Eventually the officers stopped them on the highway. Neither one of the individuals had any identification that matched that on the suitcases, and the officers believed they smelled marijuana while standing outside

the car. The defendant was arrested and the agents opened the suitcase on the spot.

In *Stevie* the Eighth Circuit, en banc, again determined, based upon *Chadwick*, that the individual's expectation of privacy is what controls inside or outside of an automobile. The Court determined that there was no dissipation of the expectation of privacy because it was in a station wagon. Again, they emphasized that control was not a problem; a suitcase was under the exclusive control of the authorities, therefore there were no exigent circumstances.

In another Fifth Circuit case, *United States* v *Bell*, 605 F 2nd 161 (1979), evidence seized from a guitar case that was seized from a co-defendant's vehicle was suppressed, based upon *Sanders* and *Chadwick*. Even though there was probable cause for the arrest, there were no exigent circumstances that existed for a warrantless search.

Eventually, the Sixth Circuit also considered this matter in *United States* v *Vickers*, 599 F 2nd 132 (1979). Based upon an informant's tip officers began surveillance of a parked tractor trailer which supposedly contained marijuana. The defendant approached the trailer and proceeded to unload a footlocker from the truck and place it in the trunk of his car. He was then stopped after a few miles, and the agent took the keys out of the ignition of the defendant's car, opened the vehicle's trunk to look for a footlocker or like container. The officers found the footlocker, opened it, and discovered the marijuana. Again, the court determined that even though probable cause existed which allowed bypassing of the warrant requirement, the evidence of the search was still suppressed.

What is apparent in all of these cases is that the control was far less than what was so apparent in our particular case. In the instant case the Arizona officers clearly had the bags in

their possession and under their control. They had verified whose luggage they had and if they were so convinced that the contraband was present they could and should have confiscated the luggage, obtained a search warrant, searched the bags and possibly have the Michigan authorities arrest the defendant-appellant if need be, although this was not necessary in that they could have arrested him themselves. None of this was done. The defendant-appellant respectfully submits that there simply were not sufficient exigent circumstances to allow this type of action with regard to the defendant-appellant's luggage in Arizona and that the search and seizure in Arizona was improper and should not be continanced at this time, that, therefore the evidence should have been suppressed.

## ISSUE II

**THE EVIDENCE OBTAINED FROM THE DEFENDANT-APPELLANT'S SUITCASES, AS A RESULT OF THE MICHIGAN SEARCH, SHOULD HAVE BEEN SUPPRESSED, AS IT WAS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE AND IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION II OF THE MICHIGAN CONSTITUTION OF 1963.**

The Court of Appeals determined that the subsequent search of the defendant-appellant's suitcases in Michigan was in fact not tantamount to a second search but was merely a completion of a first search that had begun in Arizona. In this context the defendant-appellant submits that the Court of Appeals panel misapprehends the extent and scope of the Supreme Court's decision in both *United States* v *Chadwick*,

*supra*, and its progeny *Arkansas* v *Sanders, supra*. The defendant-appellant submits that both *Chadwick* and *Sanders* speak toward the particular status of an individual's luggage and its resulting protection under the Fourth and Fourteenth Amendments from search and seizure without the benefit of a prior judicially-sanctioned search warrant. To simply state that the search in Michigan was nothing more than the completion of the initial search in Arizona does not meet the questions raised nor satisfy the very important principles involved.

The evidence showed that the Arizona authorities had called the Kalamazoo police and relayed on to them certain information regarding the defendant-appellant coming in on an airplane and being accompanied by certain luggage (App. pgs. 81(a)-84(a)). The airplane came in as scheduled, and an Officer Loney, along with an Officer Colby, observed the suitcases come into the terminal and then eventually be put into a taxicab by a cab driver (App. p. 104(a)). The cab then left the terminal area with the defendant-appellant in the back seat and was followed by police cars; the cab was then stopped and the defendant-appellant arrested (App. p. 92(a)). After the defendant-appellant had been arrested, the bags were then taken from the cab and placed behind the cab (App. pgs. 104(a), 94(a), 95(a), 102(a), 105(a)). At that time the testimony indicates that both the defendant-appellant and the bags were clearly under police control (App. pgs. 94(a), 95(a), 103(a)). There was some dispute as to whether or not Officer Loney took the bags out of the cab, or the cab driver took the bags out of the cab, however, this would appear to be irrelevant for Fourth Amendment purposes.

The black suitcase was then opened on the street by the officers (App. p. 98(a)), and the brown bag was then subsequently opened in the police station (App. p. 98(a)). It is undisputed, as recognized by the Court of Appeals, that the

defendant-appellant did not give his consent to the search and of course there had not been any priorly issued search warrant for the search of the bags (App. pgs. 97(a), 98(a)). It is further clear that we are not involved here with an inventory question as that was denied by the officer (App. p. 101(a)) and recognized as such by the Court of Appeals.

The basic law is relatively undisputed, that a warrantless search and seizure is unreasonable per se and violates the Fourth Amendment of the United States Constitution, and Article One, Section 11 of the Michigan Constitution of 1963, unless shown to be within one of the exceptions to the rule *People* v *Reed*, 393 Mich 342 (1975); *People* v *Chism*, 390 Mich 104 (1973); *United States* v *Chadwick, supra*; *Arkansas* v *Sanders, supra*. It is clear that the exceptions to the warrant requirement are jealously and carefully drawn and that the burden is clearly upon the one alleging the exception to justify the search, *United States* v *Chadwick, supra*.

The Court of Appeals in its opinion cites several cases to justify the Michigan "completion" search and seizure of the defendant-appellant's suitcases. The defendant-appellant contends that all the cases are distinguishable and more importantly either have not considered *Chadwick* or clearly have not considered the explanation of *Chadwick*, by not considering *Arkansas* v *Sanders, supra*, and its amplification of the *Chadwick* principles.

The Court of Appeals cites *United States* v *DeBerry*, 482 F 2nd 448, (2nd Cir. 1973). This case was decided far before both *Chadwick* and *Sanders* and therefore must be viewed in that light. *DeBerry* involves a private search that was conducted by a shipper based upon suspicious behavior of a customer in California. The shipper called the police in California after opening up the bags; the police arrived and searched the bags and called the New York police, and the defendant eventually picked up his suitcases and was arrested

in New York. *DeBerry* is clearly a pre-*Chadwick/Sanders* case, and it was obvious that the *DeBerry* court did not consider the particular status of personal luggage as was viewed in both *Chadwick* and *Sanders*. Furthermore, the initial search in this matter began with a clearly private search as opposed to a clearly governmental search as in the case at bar. Also, in *DeBerry* we are dealing with an item that was shipped by someone else other than the defendant where it is clear in our particular case that it was the defendant-appellant's personal luggage that is put on the plane and that the defendant-appellant accompanied the luggage by plane to Kalamazoo.

The Court of Appeals also cited *United States* v *Ford, supra*, and it is immediately apparent that we are again involved with a search that began as a private search and not a governmental search which immediately takes this case out of the factual standpoint of the instant case. Furthermore, it is again clear that *United States* v *Ford, supra*, is also a pre-*Chadwick/Sanders* case and is, therefore, also limited in its consideration of the scope of protection of personal private luggage.

In *Ford*, we are dealing with a shoebox size package as opposed to the suitcases in the instant case. Furthermore, one particular statement of the panel in *Ford* is interesting in that if to construe *Ford* is to hold that we are only involved in one continuous search, the court itself stated at 525 F 2nd at p. 1310: "illegality in *either place* would be fatal to the government's case."

Therefore, the panel in *Ford, supra*, if it was construing that we are only involved in one search, does appear to put strictures upon that search in that it notes that illegality, presumably in the existence of both probable cause and exigent circumstances, in either the initial search or the subsequent seizure, would have made the search illegal. Clearly

*Ford* is distinguishable not only on its facts but with regards to the law in view of its pre-*Chadwick* status.

The Court of Appeals also cited *Waugh* v *State, supra*, and *State* v *Pohle*, 160 NJ Super 576; 390 A 2nd 692 (1978), in support of its position of one continuous search and seizure. *Waugh* v *State, supra*, is again a pre-*Chadwick/Sanders* case and is therefore immediately distinguishable on that point alone. However, it is interesting to note that in *Waugh* v *State, supra*, both the Court of Special Appeals and then the Court of Appeals considered in detail the efficacy of both the initial search that was held in Arizona and the subsequent search that was held in Maryland. Therefore, without articulating it, both Maryland appellate courts were beginning to consider a *Chadwick/Sanders* situation, but simply did not go far enough with regards to that particular degree of the status of luggage.

What the Court of Appeals panel has done with the case at bar, is to disregard any question of exigent circumstances surrounding the Kalamazoo search. In essence, this is saying that there really was no need to consider this since there really was no "search". The defendant-appellant respectfully submits that the Maryland courts, quite to the contrary, did not treat the searches in *Waugh* v *State, supra*, in this manner.

The Court of Appeals citation of *State* v *Pohle, supra*, also involved a search that began as a private, not a governmental search. *Pohle* basically bases its decision upon *United States* v *Ford, supra*, and *United States* v *DeBerry, supra*. Again, the arguments with regards to those cases have been repeated herein. Further, while *Pohle* does mention *Chadwick*, it was also decided before *Sanders* and therefore did not have the benefit of that case for decisional purposes.

The cases as cited by the Court of Appeals simply do not hold as a maxim of law that the circumstances involved in our

case constitute only one search and seizure, and furthermore, more importantly, they do not consider the extent and the scope of the *Chadwick* and *Sanders* cases with regards to search of personal luggage and its protective status under the Fourth and Fourteenth Amendments to the Constitution.

The Court of Appeals has attempted to bypass *Chadwick* and *Sanders* by arguing that both cases are supportive of its decision in this case without regards to probable cause, but at the same time ignoring that the *Chadwick/Sanders* cases deal as importantly with exigent circumstances and the status of the right to privacy with regards to private luggage as they do with the existence of probable cause.

As the Supreme Court pointed out in *Chadwick*, probable cause alone is not enough to sustain a warrantless search. The reason probable cause alone is not enough is because of the importance of the right being invaded, the right not to have one's personal luggage subjected to government scrutiny without the prior sanction of a warrant.

If there in fact is no exigency then it is unreasonable for the government to conduct a search without the safeguards of a judicially-issued search warrant. It must be noted that this is a separate and distinct question from the existence of probable cause. Because the warrant requirement is so important to fundamental rights, it can only be bypassed when both probable cause and the exigent circumstances clearly are present. In *Chadwick* the Supreme Court determined that:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

As was noted in *Chadwick*, even though it was rather predictable that a warrant would be issued since there did appear to be probable cause for a search, the court determined that a line would be drawn and must be drawn, and if no exigency is shown to support the need for an immediate search, the search clearly must then be held to be invalid. To that same effect, *United States* v *Vickers, supra, United States* v *Bell, supra, United States* v *Stevie, supra.*

As was subsequently noted by the Supreme Court in *Arkansas* v *Sanders, supra*, there appeared to be some confusion with regards to the court's prior decision in *Chadwick. Arkansas* v *Sanders, supra*, was in response to that apparent confusion. In the *Sanders* case, officers watched the defendant leave a suitcase that they had reasonable information and belief contained marijuana. The suitcase, similar to the facts of our case, was then put into a taxicab. The defendant also entered the taxicab which was then subsequently stopped and the trunk was then opened. There are obvious factual parallels to the instant case.

The Supreme Court then went on to explain and clarify some of the rationale of the *Chadwick* decision. It again reemphasized that the mere reasonableness of the search, assessed in the light of the surrounding circumstances, is not a substitute for a judicial warrant, which is required by the Fourth Amendment. Again, it cannot be over emphasized that the circumstances of the search began with the assumption that probable cause existed that marijuana was contained in the luggage. The existence of probable cause in both *Chadwick* and *Sanders* has not been the controlling factor and this is where we respectfully submit the Court of Appeals has misapprehended their decision. The Supreme Court noted in *Sanders* that even conceding probable cause, that the stop of the vehicle was proper, and the seizure of the luggage was proper, the search on the spot was not proper

because of constitutional principles of privacy. The Supreme Court again emphasized that as long as the luggage was seized by the officers and they had it exclusively within their control and province at the time of the search, there was no reason why a warrant could not have been requested. The Supreme Court determined that after one has lawfully detained a suspect who is suspected of criminal activity, and secured his personal belongings in the nature of a suitcase, they should delay a search until after judicial approval has been obtained for such a search.

In the instant case the defendant-appellant submits that the authorities were clearly in control of the situation in Arizona, see Issue I, and clearly in control of the situtation in Michigan both at the scene and later at the police station. Even though marijuana was eventually found in the suitcases, as this court readily knows this cannot obscure the constitutional principles with regards to the nature of the search and the items that have been seized. The defendant-appellant respectfully contends that the Court of Appeals was in error and that the search of the defendant-appellant's luggage in Michigan was in fact a search and a subsequent seizure. Further, the defendant-appellant contends that the search was not sanctioned or allowed under the rationale of *Sanders* and *Chadwick*, and ask this Court to definitively state what the Michigan Courts' position should be on this point. The defendant-appellant believes that the proper avenue to take is that that has been taken by the Sixth Circuit and other federal circuits and their interpretation of the *Chadwick/Sanders* cases under fact situations which are clearly more severe than the instant case.

## ISSUE III

## THE TRIAL COURT ERRED IN NOT ORDERING THE ENDORSEMENT AND THE

## PRODUCTION OF OFFICER MICHAEL KLICK AS A RES GESTAE WITNESS AND DETERMINING THAT IF CALLED HIS TESTIMONY WOULD BE CUMULATIVE.

At the conclusion of the People's case the defendant-appellant moved to dismiss for the reason that the prosecutor had failed to move to endorse or to call Officer Michael Klick, a Tucson police officer (App. p. 107(a)). After argument on the matter, the trial court ruled that Officer Klick was not a res gestae witness and that even if he were determined to be such that his testimony would be merely cumulative and denied the defendant-appellant's motion.

Pursuant to a Remand Order of the Court of Appeals the trial court considered a motion for new trial wherein the defendant-appellant raised the issue of the lack of endorsement and production of Officer Klick. While the defendant-appellant maintained that a hearing should still be held the trial court determined that because of this Court's decision in *People* v *Willie Pearson*, et al., 404 Mich 698 (1979), that it was unnecessary to conduct a hearing as to whether or not Officer Klick was a res gestate witness since the Court had already made a determination that he was not res gestae.

During the course of the testimony it became apparent that four police officers had been involved with the activity in Arizona and that directly led up to the search of the defendant-appellant's luggage in Arizona and the Defendant-appellant's subsequent arrest in Michigan. Officer Michael Klick was the only officer who did not testify at the trial. The testimony indicated that Officer Michael Klick was on duty with Officer Sanders in the TWA baggage room smelling all the bags that were coming down the conveyor belt on the date of the search and seizure (App. pgs. 87(a)-89(a)). The testimony further indicated that Officer Klick smelled the defendant-appellant's suitcases (App. p. 72(a)) and then ob-

tained the tools and opened up the defendant-appellant's suitcase with the use of the tools (App. p. 58(a)). After the opening of the defendant-appellant's suitcase, Officer Klick, apparently put a cartoon into the suitcase and then closed up the suitcase and returned it to the airline officials.

Evidence further indicated that Officer Klick apparently relayed information to Officer Fragoso and Officer Klick then phoned to Kalamazoo to a Lieutenant Moshier of the Kalamazoo Police Department relaying information that they had regarding the defendant-appellant and the suitcases that they had searched (App. pages. 49(a)-50(a)).

The Court of Appeals determined that Officer Klick was a *res gestae* witness per *People* v *Abdo*, 81 Mich App 635 (1978). However the court then went on to determine that, based upon the record, the officer's testimony would have been cumulative. The defendant-appellant respectfully disagrees with that conclusion.

The use of the cumulative testimony exception is permissible where in all probability the testimony would have been cumulative and there is overwhelming testimony of guilt, *People* v *Hadley*, 67 Mich App 688 (1976). Assumption such as this appears to run contrary to the rule that any doubt in producing witnesses should be given to the defendant, *People* v *Hadley, supra*.

However, in this regard it should be noted that the defendant-appellant has vigorously contested the procedures involved in the "smelling" search in Arizona and any further evidence in this regard could only give the trial court itself a further indication of whether or not the activities of the officers in Arizona were legal in determining whether the evidence found there should have been admissible. In this regard, the only one harmed by the omission of this evidence is the defendant-appellant, not the prosecution.

While it is true that *People* v *Pearson, supra*, would seem to imply that there is no necessity for a hearing once a court has made a determination whether or not an individual is a *res gestae* witness or not it should also be noted that none of the criteria that were set out involved a bench trial as opposed to a jury trial. It was the trial court's belief in this particular case that no hearing was necessary in view of *People* v *Pearson, supra*. However, since this was a bench trial there is less reason for inconvenience since the trier of fact himself would have the occasion to hear the evidence and possibly forestall any additional need for remand.

For the foregoing reasons the defendant-appellant submits that a hearing should have been held and further submits that the evidence should not be considered to be cumulative since at this time it is not exactly sure what the testimony would in fact be.

## RELIEF REQUESTED

The defendant-appellant respectfully requests that this Court reverse both the Court of Appeals and the trial court in reference to Issue I and II, and suppress the results of the search, and then vacate the defendant-appellant's conviction and sentence.

In the alternative the defendant-appellant requests that, pursuant to Issue III, this Court reverse and remand for a new trial.

Respectfully submitted:

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for
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